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OBVIOUSLY OBVIOUS: OBVIOUS RISKS, POLICY AND CLAIMANT INADVERTENCE

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The relevance to negligence liability of the obviousness of a risk of injury has been the subject of a case law "explosion" in recent years. This article analyses the application of this concept, at common law and under the tort reform legislation, to an occupier's liability for failing to warn of risks arising from premises or the activities conducted upon them. Particular regard will be had to: the policy underpinning this area of law; the High Court's decisions in Vairy v Wyong Shire Council; Mulligan v Coffs Harbour City Council; and more generally, Neindorf v Junkovic; and the interaction between obvious risk and claimant inadvertence in determining breach and standard of care. Whilst the legislative reforms' impact is investigated throughout, the article concludes by arguing, with reference to the term's legislative definition and the decisions in Dederer v Roads and Traffic Authority, that the difference between the significance of "obviousness" at common law and under the reforms is not as great as the legislation suggests. Furthermore, similarly to the common law, whether a risk is obvious, and the relative weight afforded to the factors impacting upon this assessment (such as the potential for claimant inadvertence), remains uncertain and hard to predict.

I INTRODUCTION

At common law, an occupier owes each entrant a general duty to take "reasonable care" to prevent foreseeable risks of injury arising from the state or condition of premises or land.[1] The duty, whilst not confined to the premises' static condition,[2] is premised broadly upon the occupier's control, or promotion, of the site and the activities upon it.[3] The duties of occupiers are also not confined to the private domain and have been extended to public authorities[4] having the statutory care, control and management of public reserves.[5] Nevertheless, the scope of their duty is such that even if an occupier is not negligent in failing to remove or prevent a danger, they may be liable for failing to give a notice or warning of it.[6] When found, the obligation to

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[1] *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479, 488 ('*Zaluzna*').

[2] *Thompson v Woolworths (Qld) Pty Ltd* (2005) 214 ALR 452, 457-8 ('*Thompson*').

[3] Ibid; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423, 430 ('*Nagle*'); *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431, 450-1, 453, 477, 487-8 ('*Romeo*'); *Vairy v Wyong Shire Council* (2005) 221 ALR 711, [83] ('*Vairy*'); *Mulligan v Coffs Harbour City Council* (2005) 221 ALR 764, [66] ('*Mulligan*').

[4] This article does not specifically consider the common law or statutory liability of road authorities for obvious risks recently considered in: Coventry, 'You had better watch out: Liability of public authorities for obvious hazards in footpaths' (2006) 14 *Torts Law Journal* 81.

[5] Only Brennan J has suggested that the ordinary principles of negligence liability for occupiers of land may not apply to public authorities. Rather their liability is founded in a breach of statutory duty, and not occupation alone, and therefore warrants special consideration in accordance with *Aiken v Kingborough Corp* (1939) 62 CLR 179, 204-6, 210 (Dixon J) which limits the duty of reasonable care to one to prevent injury through dangers arising from the state or condition of premises which are not apparent: *Nagle* (1993) 177 CLR 423, 435-440 (Brennan J); aff'd *Romeo* (1998) 192 CLR 431, 440-3 (Brennan J); cf *Romeo* (1998) 192 CLR 431, 457-9 (Gaudron J), 460 (McHugh J), 467-8, 471-5, 485 (Kirby J), 486-7, 489 (Hayne J); *Crimmins v Stevedoring Industry Finance Committee* (1990) 200 CLR 1, 61 (Gummow J), 29 (McHugh J).

[6] *Bennett v Manly Council and Sydney Water Corporation* [2006] NSWSC 242 ('*Bennett*').

warn is one of general disclosure.[7] Therefore a warning does not have to state the precise nature, and full extent, of the risk – it is sufficient if it is disclosed in general terms. However, in considering an occupier's negligence liability for failing to warn of a risk of injury arising from a premises' state or condition, the obviousness of the risk is relevant to an assessment of what reasonableness requires.

What is "obvious" is a question of fact,[8] which at common law has not been extensively defined. In *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council,*[9] Tobias JA defined "obvious danger" as meaning that both the condition (or factual scenario facing the plaintiff) and the risk are apparent to and 'would be recognised by a reasonable man, in the position of the (plaintiff), exercising ordinary perception, intelligence and judgement.' In *Consolidated Broken Hill Ltd v Edwards*,[10] Ipp JA described obviousness of risk as 'merely a descriptive phrase that signifies the degree to which risk of harm may be apparent.' Consequently, together with a consideration of "obviousness," the need for a warning is dependant upon the circumstances of each individual case[11] - although whether a danger is ordinary or unusual, concealed or hidden, common and longstanding,[12] is relevant to this assessment. For example, it has been said that:

> Persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes. Of course, some allowance must be made for inadvertence. Certain dangers may not readily be perceived … These hazards will include dangers in the nature of a "trap" or … of a kind calling for some protection or warning.[13]

Nevertheless, within their ambit of operation,[14] a statutory definition of "obvious risk" is now provided for the purpose of the reforms "stemming"[15] from Recommendations 11, 12, 14 and 32 of the *Review of the Law of Negligence – Final Report* (2002).[16]

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[7] *Woods v Multi-Sport Holdings Pty Limited* (2002) 208 CLR 460, 473-4 ('*Woods*').
[8] *Romeo* (1998) 192 CLR 431, 491.
[9] [2004] NSWCA 247, [161] referring to *Restatement (Second) of Torts* (1965) §343A. See also [162].
[10] [2005] NSWCA 380, [53].
[11] *Romeo* (1998) 192 CLR 431, 447, 460; *Woods* (2002) 208 CLR 460, 474, 491; *Hoyts Pty Ltd v Burns* (2003) 201 ALR 470, 485-7 (Kirby J);, 286-7 (Gummow J) ('*Hoyts*'); *Vairy* (2005) 221 ALR 711, [6], [8] (Gleeson CJ and Kirby J), [17], [20], [37] (McHugh J), [118] (Hayne J); *Mulligan* (2005) 221 ALR 764, [52-3] (Hayne J), [83] (Callinan and Heydon JJ).
[12] See, eg, *Swain v Waverley Municipal Council* (2005) 213 ALR 249, [139-43] ('*Swain*'); *Neindorf v Junkovic* (2005) 222 ALR 631, [15] (Gleeson CJ – ordinary and visible), [95-7] (Hayne J – not uncommon), [100], [117] (Callinan and Heydon JJ – minor, obvious and unexceptional) ('*Neindorf*'). *Swain* was not argued in the High Court on the basis of a failure to warn body-surfers of the risk of diving due to the beach's particular sand formation, presumably because the dangers of diving into the surf were so obvious. Rather the issue was the Council's negligent placement and maintenance of flags which conveyed a misleading impression of safety: at [23], [29], [116-23], [178], [193], [222-4].
[13] *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512, 581 (Gaudron, McHugh and Gummow JJ) ('*Brodie*'). Although in the context of the liability of road authorities the notion of "obviousness" remains relevant.
[14] See *Civil Liability Act 2003* (Qld) ss 4(2), 5; *Civil Liability Act 2002* (NSW) ss 3B, 5A, sch 1 cl 6(1); *Civil Liability Act 2002* (WA) ss 3A, 5A(3); *Civil Liability Act 2002* (Tas) ss 3B, 4(3); *Wrongs Act 1958* (Vic) ss 44, 45, 66.
[15] In that the legislation enacted has not always adopted the Recommendations either solely or directly. For example, the definition of "obvious risk" at below n 232 and accompanying text is uniformly wider than that in Recommendations 11 and 14. Furthermore, the provisions regarding dangerous recreational activities and duties to warn of obvious risks (discussed below in part IV) are only loosely based upon the Recommendations. Section 56 of the *Wrongs Act 1958* (Vic) (at below n 77 and accompanying text) does not mirror any of the Recommendations and is at best an indirect result.
[16] Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002) <http://revofneg.treasury.gov.au/content/review2.asp> at 12 March 2007 ('*Ipp Report*').

Although differing slightly between the states, these reforms, in general terms and subject to specified exceptions, negate a duty to warn of obvious risks[17] – encompassing (in some instances) all liability in negligence for harm suffered as a result of the materialisation of an obvious risk of a dangerous recreational activity.[18] As such, the ambit of their operation may be viewed as being potentially wider than the common law position. There, whilst sometimes decisive,[19] the obviousness of a risk is only one of the factors to be considered in determining whether an occupier's duty of care extends to an obligation to warn of it.[20]

At common law therefore, the calculus of factors which must be weighted in addition to obviousness in determining, for the purpose of breach,[21] whether a duty of care owed requires the provision of a warning include:[22] 'the different ages, capacities, sobriety and advertance [sic] of the entrants;'[23] the commercial nature, or otherwise, of their entry;[24] the gravity or probability of the risk and the defendant's degree of control;[25] the likely efficacy of warnings if given;[26] and 'whether the imposition of a requirement to give notice could be confined to a particular place or places, or would have large implications, costs and other consequences.'[27] Relevant to the first consideration, the law has recognised that generally, in situations in which a duty of care exists, allowance for the possibility of negligence on the part of the person to whom the duty is owed is a consideration relevant to a defendant's standard of care.[28] Nevertheless, it has also been expressed that 'where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about the risk is neither reasonable nor just.'[29] However, this is not a fixed rule of common law,[30] and whilst it may be said that the greater the obviousness of risk, the smaller the allowance that should be made for claimant inadvertence, as obviousness is not determinative against a defendant's negligence liability, the potential for inadvertence, misjudgement or carelessness on the part of an entrant remains a

[17] See below n 220 and accompanying text.
[18] See below n 217 and accompanying text.
[19] See, eg, *Woods* (2002) 208 CLR 460, 474 (Gleeson CJ); 499-500 (Kirby J); *Mulligan* (2005) 221 ALR 764, [74-8] (Callinan and Heydon JJ).
[20] *Mulligan* (2005) 221 ALR 764, [38], [40] (Gummow J), [52] (Hayne J); *Vairy* (2005) 221 ALR 711, [7-8] (Gleeson CJ and Kirby J), [19], [44-7] (McHugh J), [55], [95] (Gummow J), [162] (Hayne J).
[21] Although sometimes considered when establishing a duty of care (or its scope or content), the predominant view is that obviousness is more appropriately, within the framework provided by *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47-8 (Mason J), a consideration of breach. See, eg, *Mulligan* (2005) 221 ALR 764, [6] (Gleeson CJ and Kirby J - breach), [20-6] (McHugh J - breach), [31-2], [38] (Gummow J - scope), [47], [50-2] (Hayne J - breach), [67], [72], [74-80] (Callinan and Heydon JJ - scope and breach); *Vairy* (2005) 221 ALR 711, [6-8] (Gleeson CJ and Kirby J - breach), [19], [25-9], [40], [43-7] (McHugh J - breach), [55], [58-64], [79], [95] (Gummow J - scope and breach), [162-3] (Hayne J - breach), [201], [213-4], [222-3] (Callinan and Heydon JJ - scope and breach); *Neindorf* (2005) 222 ALR 631, [3], [15] (Gleeson CJ - breach), [58], [72-6] (Kirby J - breach), [91], [97] (Hayne J - breach), [100], [115-8] (Callinan and Heydon JJ - scope and breach); *Shellharbour City Council v Rhiannon Rigby* [2006] NSWCA 308, [58]; Coventry, above n 4, 95-9; McDonald, 'The Impact of the Civil Liability Legislation on Fundamental Policies and Principles of the Common Law of Negligence' (2006) 14 *Torts Law Journal* 268, 280-3.
[22] See generally, *Hoyts* (2003) 201 ALR 470, 486-7 (Kirby J); *Vairy* (2005) 221 ALR 711, [40] (McHugh J).
[23] *Romeo* (1998) 192 CLR 431, 478 (Kirby J). See also 454, 481, 500; *Nagle* (1993) 177 CLR 423, 431; *Woods* (2002) 208 CLR 460, 500; *Neindorf* (2005) 222 ALR 631, [27], [72-6], [80].
[24] See below n 192-196 and accompanying text.
[25] See below n 69-73 and 115 and accompanying text.
[26] See, eg, *Vairy*, (2005) 221 ALR 711, [40], [42] (McHugh).
[27] *Romeo* (1998) 192 CLR 431, 484-5. See also below n 132 and 199-201 and 211-215 and accompanying text.
[28] See, eg, *Bus v Sydney City Council* (1989) 167 CLR 78, 90 ('*Bus*').
[29] *Romeo* (1998) 192 CLR 431, 478 (Kirby J).
[30] *Woods* (2002) 208 CLR 460, 474 (Gleeson CJ), 499-500 (Kirby J); *Czatyrko v Edith Cowan University* (2005) 214 ALR 349, 352 ('*Czatyrko*'); *Neindorf* (2005) 222 ALR 631, [72-6] (Kirby J).

consideration relevant to standard of care and breach.[31]

In this context, this article considers and contrasts the principles relevant to the determination of an occupier's liability for failing to warn of obvious risks, both at common law and under the tort reform legislation, and concentrates on the following issues. Firstly, part II elucidates the policy underpinning this area of law. Secondly, via an analysis of the High Court's decisions in *Vairy v Wyong Shire Council*;[32] *Mulligan v Coffs Harbour City Council*;[33] and more generally *Neindorf v Junkovic*,[34] the interaction between obvious risk and claimant inadvertence, at common law, in determining breach and standard of care is considered in part III. Finally, whilst the legislative reforms' impact is investigated throughout, as its scope and application depends upon a consideration of "obviousness," in part IV, case law concerning the term's legislative definition is discussed. With particular reference to the decisions in *Dederer v Roads and Traffic Authority*[35] and *Great Lakes Shire Council v Dederer; Roads and Traffic Authority of NSW v Dederer*,[36] consideration is given to whether the difference between the significance of obviousness at common law and under the reforms is as great as the legislation suggests. This article argues that, similarly to the common law, whether a risk is obvious, and the relative weight afforded to the factors impacting upon this assessment – such as the potential for claimant inadvertence – remains uncertain and hard to predict.

II POLICY UNDERPINNING FAILURE TO WARN LIABILITY

In determining the 'measure of precaution for the safety of users of premises' an occupier's common law duty and standard of care is not one of strict liability, or elimination of risk, but "reasonableness," based upon prevailing community standards.[37] Consequently, what is reasonable to require of occupiers is not a matter of 'legal prescription,' rather it compels in each case a 'normative judgement'[38] as to whether, or not, an obligation to warn arises – based upon relevant legal principles.

It may be perceived therefore as not surprising that this area exhibits, in general, a divergence of opinion in many cases as to firstly, whether a risk is obvious and secondly, whether reasonableness requires a warning. For example, in *Neindorf v Junkovic* Gleeson CJ opined that:

> When courts refer to "community values" they may create an impression that such values are reasonably clear, and readily discernible … [However the] divergence of judicial opinion in the present case upon what is essentially a question of … reasonableness … probably reflects a

[31] *Romeo* (1998) 192 CLR 431, 454-5 (Toohey and Gummow JJ); *Vairy* (2005) 221 ALR 711, [163] (Hayne J); [222] (Callinan and Heydon JJ).
[32] (2005) 221 ALR 711.
[33] (2005) 221 ALR 764.
[34] (2005) 222 ALR 631.
[35] [2005] NSWSC 185.
[36] [2006] NSWCA 101.
[37] *Romeo* (1998) 192 CLR 431, 489 (Hayne J); aff'd *Thompson* (2005) 214 ALR 452, 461 (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ); *Swain* (2005) 213 ALR 249, [5] (Gleeson CJ); *Neindorf* (2005) 222 ALR 631, [8-10] (Gleeson CJ), [83] (Kirby J), [93-5] (Hayne J), [112-4] (Callinan and Heydon JJ); *Vairy* (2005) 221 ALR 711, [2-3] (Gleeson CJ and Kirby J), [28] (McHugh J); *Mulligan* (2005) 221 ALR 764, [2-3] (Gleeson CJ and Kirby J).
[38] *Neindorf* (2005) 222 ALR 631, [8-9] (Gleeson CJ), [83] (Kirby J); *Vairy* (2005) 221 ALR 711, [2] (Gleeson CJ and Kirby J), [97] (Gummow J); *Mulligan* (2005) 221 ALR 764, [2] (Gleeson CJ and Kirby J), [80] (Callinan and Heydon JJ – "common sense"); aff'd *Langham v Connells Point Rovers Soccer Club Inc* [2005] NSWCA 461, [55].

> diversity of opinion that would exist throughout the whole community.[39]

There, whilst the majority of the High Court were influenced by the obviousness of the risk posed by a 10-12 mm ridge in the appellant's driveway, such that there was no liability for failing to eliminate or warn of it,[40] Kirby J held the appellant liable. According to his Honour,[41] the unevenness may not have been obvious to a person like the respondent, who had no reason to anticipate it and who, in the course of entering the premises for the purpose of a garage sale and the occupier's economic gain, was focusing their attention on the goods on offer. The majority were also influenced by the fact that if a duty were imposed it would require the removal or neutralisation of every such hazard on private property where visitors could reasonably be anticipated, 'yet not all people live, or can afford to live, in premises that are completely risk free.'[42]

Furthermore, whilst "obviousness" is a consideration upon which reasonable judicial minds differ, it is also dependant, in many respects, upon the breadth with which the risk, or condition said to be obvious, is defined. For example, the majority in *Woods v Multi-Sport Holdings Pty Ltd* found no obligation to warn of the dangers of eye injury when playing indoor cricket,[43] such risks being obvious and attainable 'after a few moments observation of the game … [p]layed as it was, [in a confined space] with a semi-flexible ball and a bat with which to hit it as hard as possible.'[44] In contrast the dissenting judgements of McHugh and Kirby JJ[45] concluded that the risk was non-obvious by focusing upon the particular malleability of an indoor cricket ball, as apposed to an outdoor one, facilitating its moulding to the eye socket and destruction of ocular vision.

Nevertheless, Kirby J in *Hoyts Pty Limited v Burns* infers that when exercising normative judgement in this area one must:

> take into account the social considerations that the law is seeking to advance. From the point of view of the occupier, it is seeking to encourage attention to, and consideration of, accident prevention by the party ordinarily with the superior means and interest to "keep abreast of publicly available or expert knowledge concerning the risks of injury in such activities." From the point of view of the entrant, the law is seeking to uphold that person's entitlement to make informed choices concerning the kind of risks in which he or she will participate …[46]

This policy objective, which lies behind an occupier's common law liability to warn, can be further analysed in terms of personal responsibility, individual autonomy and vulnerability.

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[39] (2005) 222 ALR 631, [9-10].
[40] Ibid [15-7] (Gleeson CJ), [95-7] (Hayne J), [114-7] (Callinan and Heydon JJ).
[41] Ibid [27], [60], [62-6], [74-7]. His Honour also emphasised: the appellant's knowledge of the risk; the practicability of available precautions; and the likely variations in age, vision, capacity and stability of invited entrants: at [59], [61], [67-71], [87-8].
[42] Ibid [8] (Gleeson CJ). See also [4] (Gleeson CJ), [112] (Callinan and Heydon JJ).
[43] (2002) 208 CLR 460, 472-4 (Gleeson CJ), 503-4 (Hayne J), 509 (Callinan J).
[44] Ibid 509 (Callinan J).
[45] Ibid 484 (McHugh J), 499-501 (Kirby J).
[46] (2003) 201 ALR 470, 486 (citations omitted). This case concerned whether an occupier's duty of reasonable care in the circumstances required the posting of a warning to cinema patrons concerning the dangers created by the provision of retractable seating. However, the case was ultimately decided on causation – not breach of duty or obviousness of risk.

A *Personal Responsibility*

Justice Kirby's statement in *Hoyts*, infers that in assessing reasonableness in this area, the personal responsibility of both the plaintiff and the defendant is in issue. The task is, if you like, to achieve 'an appropriate balance between personal responsibility for one's own conduct and social expectations of proper compensation and care.'[47] What must be balanced therefore is firstly: what is reasonable to require of occupiers in order to protect entrants from a risk of injury associated with the condition of their premises[48] - for example, whether if because of previous accidents or otherwise an occupier could be expected to better know of a particular hidden risk against which a warning should be given; and secondly: the remoteness of the likelihood that given the nature of the risk, being obvious, a reasonable plaintiff will not avoid it.[49] In this sense, one who fails to exercise appropriate care with respect to a particular risk acts to their peril with respect to that risk[50] and in the case of an obvious risk, this person may be the plaintiff. Therefore in some circumstances a danger, such as approaching a precipitous cliff edge[51] or being struck by a falling tree in a forest reserve during gusty winds,[52] is so objectively obvious or usual that, when coupled with the expectation that persons exercise care for their own safety, there is no obligation to issue a warning and an occupier's duty 'is satisfied by letting the blindingly obvious speak for itself.'[53]

In the context of a duty based upon reasonableness, the same approach applies to occupiers' liability for injuries from recreational activities. When a risky activity is engaged in voluntarily, and particularly where it would not have been undertaken at all if it were less dangerous,[54] there is a point at which the participant 'must take personal responsibility for what they do. That point is reached when the risks are so well-known and obvious that it can reasonably be assumed that the individuals concerned will take reasonable care'[55] for themselves. There would, therefore, be no duty upon an authority to warn of the "ordinary risks" of swimming in the sea, such as being dumped by surf, attacked by a shark, or caught in a rip.[56] Nevertheless, as confirmed by Gleeson CJ and Kirby J in *Vairy v Wyong Shire Council*,[57] whilst most risky recreational activities therefore are not the subject of warning signs, there may be some circumstances in which reasonableness requires a warning. For example, in some cases what might otherwise be an obvious risk, such as diving into water of unknown depth,[58] may be obscured by inadvertence caused by familiarity with an area's common practice, such that a warning is reasonable. In *Berrigan Shire Council*

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[47] Spigelman, 'Tort Law Reform: An Overview' (2006) 14 *Tort Law Review* 5, 6 – in the context of changed expectations in Australian society about personal responsibility and tort.
[48] *Neindorf* (2005) 222 ALR 631, [8] (Gleeson CJ).
[49] *Thompson* (2005) 214 ALR 452, 460; *Vairy* (2005) 221 ALR 711, [79].
[50] Ripstein, *Equality, Responsibility and the Law* (1999) 69.
[51] *Romeo* (1998) 192 CLR 431.
[52] *Secretary to the Department of Natural Resources and Energy v Harper* [2000] VSCA 36.
[53] *Franklins Selfserve Pty Ltd v Bozinovska* (Unreported, New South Wales Court of Appeal, Mason P, Priestley JA and Fitzgerald AJA, 14 October 1998) [6] (Mason P).
[54] *Agar v Hyde* (2000) 201 CLR 552, 583, 561 ('*Agar*'). For example, 'the very aspects of body-surfing that make it dangerous provide the pleasures and thrills that make it popular': *Prast v Town of Cottesloe* [2000] WASCA 274, [34] (Ipp J) ('*Prast*').
[55] *Prast* [2000] WASCA 274, [44] (Ipp J). Also [41]; *Agar* (2000) 201 CLR 552, 562, 583.
[56] See, eg, *Prast* [2000] WASCA 274, [43]. In *Vairy* (2005) 221 ALR 711, [217] Callinan and Heydon JJ stated that it could not be 'seriously suggested that … a shire should erect a multiplicity of signs in the vicinity of its beaches saying "swimming can be dangerous".'
[57] (2005) 221 ALR 711, [8].
[58] *Berrigan Shire Council v Ballerini* [2005] VSCA 159, [12] ('*Berrigan*').

v Ballerini,[59] together with the swimming hole's community reputation as being safe, 'Mr Ballerini's extensive experience led him to believe that the water into which he dived was so deep that he could not reach the bottom.' Consequently, the danger that it had been rendered too shallow by recent flooding, was a concealed risk of which the Council, having control of the area and promotion of its use, ought to have known and protected against.

That in assessing reasonableness, the personal responsibility of both the plaintiff and the defendant is in issue has been confirmed by Callinan and Heydon JJ in *Mulligan v Coffs Harbour City Council*:

> It is only reasonably to be expected that people will conduct themselves according to dictates of common sense, which must include the observation of, and an appropriately careful response to what is obvious. Courts in deciding whether that response has been made are bound to keep in mind that defendants have rights and interests too.[60]

However whilst the importance of maintaining such a balance is borne out by the fact that 'if the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence,'[61] their Honours in *Vairy* confirm that:

> the "duty" to take reasonable care for his own safety that a plaintiff has is not simply a nakedly self-interested one … [It] is not just to look out for himself, but not to act in a way which may put him at risk, in the knowledge that society may come under obligations of various kinds to him if the risk is realized.[62]

Consequently the court's normative enquiry may extend beyond an assessment of responsibilities as between plaintiff and defendant, to society at large.

B *Individual Autonomy*

Further according to Kirby J in *Hoyts*, when deciding whether an occupier's duty of reasonable care in the circumstances of an individual case includes an obligation to warn of a risk of harm, a consideration of the risk's "obviousness" is arguably also founded upon the premise of ensuring that risks faced by individuals[63] are informed.[64] Warnings only serve a purpose if they are likely to advise of something overlooked or forgotten, or not otherwise known from common knowledge or casual observation.[65] Therefore in relation to apparent or well known dangers, a defendant's obligation to warn may be excluded where it would only provide information which ought already be present in the mind of a reasonable plaintiff and thus not further their autonomy or capacity for rationally informed decision-making.

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[59] Ibid [53] (Nettle JA). See also [11-2] (Chernov JA); [22], [33], [41-7], [51-6] (Nettle JA).
[60] (2005) 221 ALR 764, [80].
[61] *Thompson* (2005) 214 ALR 452, 461 ((Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ). See also *Romeo* (1998) 192 CLR 431, 445-6 (Toohey and Gummow JJ); *Neindorf* (2005) 222 ALR 631, [74-5] (Kirby J); *Vairy* (2005) 221 ALR 711, [46] (McHugh J).
[62] (2005) 221 ALR 711, [220].
[63] Or, at least, a reasonable individual in the position of the plaintiff.
[64] *Woods* (2002) 208 CLR 460, 501 (Kirby J).
[65] *Vairy* (2005) 221 ALR 711, [7] (Gleeson CJ and Kirby J), [148], [163] (Hayne J) [100] (Gummow J); *Mulligan* (2005) 221 ALR 764, [6] (Gleeson CJ and Kirby J), [25-6] (McHugh J), [31] (Gummow J); *Commissioner of Main Roads v Jones* (2005) 215 ALR 418, 430 (Gummow and Hayne JJ).

Indeed, where the risk of an activity on premises is objectively obvious, and yet an entrant undertakes that activity, why should an occupier be liable? In these circumstances, if liability were owed in relation to the risk, it may serve to decrease individual autonomy overall. It would do so because it would deter those occupiers from allowing or providing access to those activities 'lest they be held liable for the consequences of the individual's free choice.'[66] Consequently, the choices available to all would be diminished. In this vein, the High Court in *Vairy* opined that:

> many forms of recreation involve a risk … Swimmers often enter the water by diving, or plunging head-first … [But] short of total prohibition, it is impossible to eliminate such risks: and no one suggests that swimmers should be prohibited generally from entering the water head-first.[67]

However the obviousness of a risk of injury is not automatically conclusive of an occupier's obligation to warn. Nevertheless the additional factors considered[68] also facilitate the duty's championing of an entrant's right to determine, on the basis of all relevant information, the risks in which they will participate. As discussed previously, where there is nothing unusual in relation to a particular risk concerning land or premises, a plaintiff is in just as good a position to assess that risk as the putative defendant. However where an occupier is in control such that it creates, or encourages a risk of injury and is therefore armed with knowledge that an entrant does not have, or ought to have, concerning the danger, this argues in favour of a "duty" to warn.[69]

The degree or probability of risk must also be considered. Some risks are so great that, even if obvious, an obligation may be imposed on the party in control to warn others.[70] This ensures that, given the risk's severity and its consequences, it is not overlooked or desensitised in the plaintiff's decision-making process. For example, outside the field of occupiers' liability, it was once stated that a cigarette manufacturer would not be 'relieved of [a] duty to warn because the risk of cigarettes to health is now "obvious".'[71] Indeed McHugh J stated in *Vairy* that 'ordinarily, when the obviousness of a risk requires no action, the magnitude and likelihood of the risk will be so insignificant and so expensive or inconvenient to avoid that reasonable care requires neither the risk's elimination nor a warning concerning its propensity.'[72] However, whilst the obviousness of a risk, in such cases, may be used to argue that those in control of its source have the primary responsibility to eliminate it, the self-evident character of such a "hazard" may be equally used, as in *Neindorf*, to argue against liability on the basis of its low probability of occurrence – in that irrespective of its gravity there is a low probability that a reasonable entrant would fail to avoid the risk, or incur it non-voluntarily.[73]

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[66] *Agar* (2000) 201 CLR 552, 583-4 (Gaudron, McHugh, Gummow and Hayne JJ).
[67] (2005) 221 ALR 711, [5] (Gleeson CJ and Kirby J). See also [219] (Callinan and Heydon JJ).
[68] Such as: the defendant's degree of control; the gravity and probability of the risk; the likely efficacy of warnings if given; and the entrants' ages, capacities, sobriety and advertence. See above n 21-27 and accompanying text.
[69] *Mulligan* (2005) 221 ALR 764, [82] (Callinan and Heydon JJ); *Vairy* (2005) 221 ALR 711, [13] (Gleeson CJ and Kirby J), [92] (Gummow J), [131], [161] (Hayne J).
[70] *Woods* (2002) 208 CLR 460, 500 (Kirby J); aff'd *Neindorf* (2005) 222 ALR 631, [73] (Kirby J).
[71] *Woods* (2002) 208 CLR 460, 500 (Kirby J).
[72] *Vairy* (2005) 221 ALR 711, [19]. See also [45-7]; *Mulligan* (2005) 221 ALR 764, [25].
[73] (2005) 222 ALR 631, [37], [73] (Kirby J), [117] (Callinan and Heydon JJ – the danger caused by the uneven concrete slabs was minor, obvious, encountered unexceptionally, and, on the day of the injury, had been safely traversed by others). Case discussed at above n 39-42 and accompanying text. See also *Vairy* (2005) 221 ALR 711, [163] (Hayne J).

Whether or not the circumstances are such that entrants are in a position to adequately perceive, and thus make an informed decision about risks present, is also an object behind the courts' consideration of claimant inadvertence and a warning's likely efficacy. By excluding liability where the provision of data would be inconsequential to an entrant's assessment, or undertaking, of risk, the objective of providing information to enable rational and relevantly informed choices is preserved – For there would be no purpose in issuing warnings unless it were reasonable to expect that people would modify their behaviour in response to them.[74] Consequently, in *Romeo v Conservation Commission*[75] the discharge of the occupier's duty did not require a warning where the entrant's decision-making capacity was impaired by alcohol, the risk posed by the cliff face being obvious to one taking reasonable care for their own safety. However in *Vairy*, regarding those desensitised to the risk of diving by the practice at that location of doing so, McHugh J opined that: 'a warning sign may not have deterred all. But at least it must have made many stop and think of what might happen.'[76]

1 *Civil Liability Reforms*

The relationship between an occupier's obligation to warn and a claimant's capacity for informed choice is supported by s 56(1) of *the Wrongs Act 1958* (Vic), which provides that where, for the purpose of establishing that a defendant has breached a duty of care, the plaintiff alleges that the defendant has failed to give information, or warn of a risk of harm, the 'plaintiff bears the burden of proving, on the balance of probabilities, that [they were] not aware of the risk or information.' The section, which is not confined to occupiers' liability, does not affect a 'duty of care to give a warning of a risk of harm, or other information'[77] generally, and whilst framed in terms of breach, according to its Explanatory Memorandum,[78] creates an evidentiary presumption of knowledge relevant to causation.

Where a plaintiff knows of a risk, whether obvious or otherwise, a failure to warn claim will rightly not succeed due to lack of causation.[79] However, given firstly, that negligence is a 'unified concept' where each element of the action is part of an 'integral whole' and 'can only be defined in terms of the others',[80] and secondly, that the "likely effect of warnings if given" has also been recognised as a relevant determinant of the scope or standard of an occupier's liability,[81] s 56, even if only considered in terms of the damage element, may be interpreted as confirming that in attributing liability in this area generally, a warning will only serve a purpose, where it is likely to advise a plaintiff of something not already known.

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[74] *Thompson* (2005) 214 ALR 452, 461 (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ).
[75] (1998) 192 CLR 431, 447, 450-2, 454-6, 473, 478-83. A duty to fence or light the cliffs was also rejected.
[76] (2005) 221 ALR 711, [42]. His Honour was however in the minority: see below n 136 and accompanying text.
[77] *Wrongs Act 1958* (Vic) s 56(5). It also does not apply to a claim for damages in respect of risks associated with work done by one person for another, unless relating to the provision of, or failure to provide, a health service: s 56(2)-(4).
[78] The Explanatory Memorandum, Wrongs and Other Acts (Law of Negligence) Bill 2003 (Vic) 6 provides that the provision's purpose 'is to reinforce the fact that even if there may have been a failure to warn, this does not of itself establish that such a failure caused any harm. Whether or not the plaintiff already knew about the risk or relevant information will be one factor that is relevant to determining causation.'
[79] Causation is determined subjectively: see, eg, *Hoyts* (2003) 201 ALR 470, 476, 483.
[80] *Graham Barclay Oysters Pty Limited v Ryan* (2002) 211 CLR 540, 622; *Tame v New South Wales; Annetts v Australian Stations Pty Limited* (2002) 211 CLR 317, 349; *Neindorf* (2005) 222 ALR 631, [50].
[81] See above n 22 and 26 and accompanying text.

Incidentally, it may be difficult for a plaintiff to prove their subjective unawareness of a risk, for the purpose of the section. Indeed, it may likely require more than just the plaintiff's "say so," particularly if the risk "is" obvious. For example, in the context of causation, it has been stated that 'evidence of what a claimant would have done if a non-existent warning had been given by a hypothetical sign is so hypothetical, self-serving and speculative as to deserve little (if any) weight, at least in most circumstances.'[82] Presumably therefore a similar observation can be made about a claimant's hindsight evidence that they were unaware of a risk. Furthermore, concerning a doctor's failure to warn of a risk of treatment, in *Rosenberg v Percival* Kirby J expressed that: 'if a *reasonable person* would have undergone treatment, regardless of disclosure, then in the absence of personal characteristics or circumstances which would explain a refusal, it must be difficult for a court to conclude that the plaintiff would have rejected the treatment.'[83] Consequently, where a risk is objectively obvious it is likely that a court will attach less credit to a plaintiff who simply claims they had no knowledge of it.[84] Indeed it has been said that if it is obvious that a claimant ought not to have done what they did, 'then it is difficult to see how a failure to tell [them] was a cause of the injury.'[85] Additionally, to the extent that the Explanatory Memorandum is not followed, and a plaintiff's subjective knowledge of the risk is, in the future, considered as part of breach of duty pursuant to s 56, this may reflect a departure from the common law. There a plaintiff's subjective awareness of a risk is irrelevant unless it represents, in the circumstances, the knowledge or response of a reasonable person.[86]

Similar observations can be made in relation to the reforms enacted in all states[87] which, for the purpose of the defence of voluntary assumption of risk, deem a plaintiff to be subjectively aware of a risk that is 'objectively obvious,'[88] unless the plaintiff proves, on the balance of probabilities, that they were not aware of the risk. In addition to reversing the onus of proof in relation to the plaintiff's subjective knowledge of a risk for the purpose of the defence (where that risk is obvious),[89] the reforms generally reduce the need to show that a plaintiff was fully aware of the particular risk and its extent[90] – awareness of the 'type or kind of risk' is sufficient.[91] Once a risk is

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[82] *Hoyts* (2003) 201 ALR 470, 483 (Kirby J). See also *Rosenberg v Percival* (2001) 205 CLR 434, 443-9, 463, 486, 488-9; *Chappel v Hart* (1998) 195 CLR 232, 246; *Vairy* (2005) 221 ALR 711, [226]. However, the *Wrongs Act 1958* (Vic) has no equivalent of s 11(3) of the *Civil Liability Act 2003* (Qld) which provides that: 'if it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of duty had not been so in breach … any statement made by the person suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.'

[83] (2001) 205 CLR 434, 486 (emphasis added) confirming a statement made by Monks (1993) 17 *University of Queensland Law Journal* 222, 233.

[84] Lunney, 'Personal Responsibility and the "New" Volenti' (2005) 13 *Tort Law Review* 76, 80.

[85] *Commissioner of Railways v Halley* (1978) 20 ALR 409, 418 (concerning an employer's negligent failure to warn).

[86] *Vairy* (2005) 221 ALR 711, [49]; *Mulligan* (2005) 221 ALR 764, [22] (McHugh J – 'in determining whether the respondents' duties of care required the erection of a warning sign, the issue has to be evaluated having regard to what the respondents knew or ought to have known concerning the conditions of the channel and the likely knowledge of the users of the channel concerning its dangers … [They were not] to be determined by reference to the appellant's knowledge of the risks …').

[87] *Civil Liability Act 2003* (Qld) s 14; *Civil Liability Act 2002* (NSW) s 5G; *Civil Liability Act 2002* (WA) s 5N; *Civil Liability Act 2002* (Tas) s 16; *Civil Liability Act 1936* (SA) s 37; *Wrongs Act 1958* (Vic) s 54 (not applicable to a claim for damages relating to: the provision of, or the failure to provide, a professional or health service; or risks associated with work done by one person for another: s 54(2)).

[88] See legislative definition of "obvious risk," at below n 232 and accompanying text.

[89] See, eg, *Smith v Perese & Ors* [2006] NSWSC 288, [74] ('*Smith*').

[90] *Osborne v London and North-Western Railway Co* (1888) 21 QBD 220 ('*Osborne*').

classified as obvious, it will therefore remain difficult for a plaintiff to subjectively prove their non-awareness of it. For example, in *Great Lakes Shire Council v Dederer; Roads and Traffic Authority of NSW v Dederer*[92] it was irrelevant that the claimant, although subjectively knowing of some risk of injury in diving from a height into water of variable depth, did not fully comprehend the particular risk, at the location in question, of serious spinal injury or shallow water. Consequently, although a subjective consideration of risk is appropriate in the context of *volenti*,[93] by making the defence easier to establish, the legislation again raises an evidentiary presumption reflective of the law's general policy of personal responsibility and plaintiff autonomy in relation to obvious risks. The requirement of only a "general knowledge" of the risk by the plaintiff is also compatible with an occupier's common law obligation of only "general disclosure."[94] However, the defence's remaining elements – namely that the plaintiff voluntarily "accept" both the physical and legal risk[95] – remain unaffected. Therefore, even where a claimant is presumed to be aware of an obvious risk, evidence that an activity was undertaken: without adverting to the risk; or due to a belief that the risk would not materialise, may still negative the proposition that they accepted the risk.[96]

In New South Wales and Western Australia, the reforms are not expressly restricted to *volenti*[97] and in the context of an occupier's liability to warn of a risk, may consequently be applied in the future in a way similar to s 56 of the *Wrongs Act 1958* (Vic). That is to say such that, for the purpose of causation, a plaintiff will be taken to be subjectively aware of an objectively obvious risk, unless they positively establish that they were not so aware. Indeed, the relevant section of the New South Wales *Civil Liability Act 2002*, s 5G, does appear to have been raised, albeit unsuccessfully,[98] where *volenti* has not been pleaded.[99] It has even been considered for the purpose of: breach of a duty of care;[100] and defining the ambit of the risk said to be obvious.[101] However, as the

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[91] See, eg, *Civil Liability Act 2003* (Qld) s14(2) which provides that 'a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.' This reform is not included in the *Wrongs Act 1958* (Vic). Also, Keeler, 'Personal Responsibility and the Reforms Recommended by the Ipp Report: 'Time future contained in time past' (2006) 14 *Torts Law Journal* 48, 69-72.

[92] [2006] NSWCA 101, [157-8] (Ipp JA).

[93] See, eg, *Osborne* (1888) 21 QBD 220; *Carey v Lake Macquarie City Council* [2007] NSWCA 4, [75] ('*Carey*').

[94] *Woods* (2002) 208 CLR 460, 473-4. See further above n 7 and accompanying text.

[95] *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656; *Rootes v Shelton* (1967) 116 CLR 383.

[96] A 'belief that the dangers (of which [the plaintiff] had full appreciation) would not materialise, would negative the proposition that he accepted those dangers': *Canterbury Municipal Council v Taylor* [2002] NSWCA 24, [147]. See further, at common law, *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* [2004] NSWCA 247, [303-12] (Tobias JA. Mason P concurring) where the plaintiff had not accepted the risk of diving into water of variable or unknown depth, as due to previous diving in the area he had assumed that he could dive safely. In relation to the reforms, and s 5G of the *Civil Liability Act 2002* (NSW), see, *Carey* [2007] NSWCA 4, [98-108]. Here although the plaintiff was presumed to have been aware of the obvious risk that cycling along a path in darkness would involve a risk of hitting obstacles (there a bollard), the plaintiff could not be shown to have 'thought about', and therefore voluntarily accepted, that risk.

[97] Applying in determining 'liability for negligence' and 'liability for damages for harm caused by the fault of a person' respectively.

[98] As the risk was not obvious.

[99] *Hamilton v Blue Circle Southern Cement Ltd* [2006] NSWSC 147 ('*Hamilton*'). Considered in the context of *volenti* in: *Smith* [2006] NSWSC 288 (not a failure to warn case); *Dederer v Roads and Traffic Authority* [2005] NSWSC 185; *Great Lakes Shire Council v Dederer; Roads and Traffic Authority of NSW v Dederer* [2006] NSWCA 101 ('*Dederer*'); *Maloney Pty Ltd v Hutton-Potts* [2006] NSWCA 136, [101] ('*Maloney*'); *Telstra Corporation Ltd v Bisley* [2005] NSWCA 128 (considered generally but not relied upon); *Carey* [2007] NSWCA 4 (not argued as a failure to warn on appeal).

[100] *Waverley Council v Ferreira* [2005] NSWCA 418 (not a failure to warn case).

reforms appear under the division heading "Assumption of Risk" an argument may exist for their confinement to the *volenti* defence.[102] Nevertheless, although initially confined within the context of *volenti* in *Maloney Pty Ltd v Hutton-Potts*, Santow JA stated that s 5G also reflects a wider proposition that 'there can be no need to warn of a risk one is presumed to know.'[103]

C *Vulnerability*

Plaintiff vulnerability is another policy factor[104] relevant to a consideration of what reasonableness requires[105] in the context of an occupier's liability to warn. For as stated by Kirby J in *Neindorf v Junkovic*:

> The idea has spread … that occupiers, with responsibilities for the safety of premises can totally ignore those responsibilities because of the alleged obviousness of the risk to entrants. In principle that is not, and cannot be the law … [However] it has been repeatedly deployed … as an excuse to exempt those with greater power, knowledge, control and responsibility over risks from a duty of care to those who are vulnerable, inattentive, distracted and more dependent.[106]

Vulnerability is defined as a plaintiff's inability to protect themself[107] from a risk of injury – whether by reason of ignorance, or social, political or economic constraint.[108] However as stated in *Vairy v Wyong Shire Council*, the availability, or otherwise, of insurance is irrelevant in this context: 'that opposed to public authorities are "vulnerable victims" unlikely to have protection from insurance against the risk of serious injury in recreational pursuits, should not skew consideration of the legal issues.'[109] An assessment of vulnerability is not confined to considerations relevant to the particular individual,[110] rather it is more commonly viewed in the context of the "class of persons" to whom the plaintiff belongs - or whether a plaintiff, in the broad context of their relationship with the defendant, would "ordinarily" be considered to be vulnerable.[111] The obviousness of a risk is similarly assessed, not from an individual perspective, but from that of an ordinary, or reasonable, person.[112]

Therefore in the context of an occupier's negligence liability for failing to warn of a risk of injury arising from a premises' state or condition, from the viewpoint of the

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[101] See further *Dederer* [2005] NSWSC 185 at below n 267-271 and accompanying text.
[102] See *Carey* [2007] NSWCA 4, [71]; *Interpretation Act 1987* (NSW) s 35(1)(a); *Interpretation Act 1984* (WA) s 32(1); Mcdonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27 *Sydney Law Review* 443, 469.
[103] [2006] NSWCA 136, [102]. See also [101] (Santow JA), [171] (Bryson JA).
[104] See, eg, *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 285 ('*Perre*'); *Fortuna Seafoods Pty Ltd as Trustee for the Rowley Family Trust v The Ship "Eternal Wind"* [2005] QCA 405, [78].
[105] Although traditionally used to describe the circumstances in which a duty of care should be found to exist, as the elements of the negligence action are interrelated (see above n 80) notions of vulnerability pervade across the action. See, eg, *Harvey v PD* (2004) 59 NSWLR 639 (considered in causation); *Koehler v Cerebos (Australia) Limited* (2005) 222 CLR 44, 55, 59 (considered in breach).
[106] (2005) 222 ALR 631, [73-6]. Referring to his Honour in *Romeo* at above n 29, and accompanying text.
[107] See, eg, *Perre* (1999) 198 CLR 180, 216, 220, 225; *Woolcock Street Investments v CDG Pty Ltd* (2004) 216 CLR 515, 530, 549 ('*Woolcock*').
[108] *Woolcock* (2004) 216 CLR 515, 549.
[109] (2005) 221 ALR 711, [53] (Gummow J).
[110] See, eg, *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 369; cf 401 ('*Northern Sandblasting*') (where the vulnerability of the particular plaintiff, being a child, was the focus).
[111] See, eg, *Woolcock* (2004) 216 CLR 515, 558-9, 586, 590 (consideration of the vulnerability of the plaintiff as a member of a class of subsequent owners of commercial premises); *Northern Sandblasting* (1997) 188 CLR 313, 398, 401 (consideration of tenants as a 'generally vulnerable group' as against a landlord).
[112] See above n 9 and accompanying text; *Vairy* (2005) 221 ALR 711, [48-9].

relationship between the plaintiff and the defendant, where a risk is obvious to a reasonable person, it may be said that an occupier owes no obligation to warn of it – as an entrant is, in those circumstances, not ordinarily vulnerable. Not reasonably being ignorant, or uninformed, of the danger,[113] the entrant is in just as good a position as anyone else to protect against it. Consequently, vulnerability may overlap with the notions of personal responsibility and autonomy considered above. Indeed Callinan and Heydon JJ, by concluding that there was 'a very clear duty of the appellant … to make some soundings at least of depth, and accordingly of risk to himself' infer that according to their Honours the appellant in *Vairy* was not vulnerable to the obvious risk, in that instance, of diving into water of variable or unknown depth.[114] Nevertheless, as affirmed by Kirby J in *Neindorf*, it may remain that, in some cases, the higher the risk, even if obvious, the more likely the imposition of an obligation upon the party in control to warn others – particularly where an entrant has no entitlement to take steps to make the premises safer. There the entrant remains vulnerable:

> In a sense, the obviousness of risk speaks chiefly to those who are in charge of the source of a risk and who have the opportunity, and prime responsibility, to reduce or eliminate it. The respondent had no entitlement to change the appellant's premises.[115]

Furthermore, in circumstances where an otherwise obvious risk is obscured, say by an established and tolerated practice of diving into the shallow end of a public pool, users may again become 'vulnerable to error' or inadvertent because of a lack of appreciation of the risk, such that a breach of the occupier's duty of care is found.[116] If we move then to further consider this interaction between obvious risk and claimant inadvertence in determining breach and standard of care.

III COMMON LAW DEVELOPMENTS – OBVIOUS RISK AND INADVERTENCE

As illustrated incidentally throughout part II,[117] occupiers' liability cases frequently concern injury involving inadvertence, misjudgement or carelessness by the entrant on the land concerned. For example, the High Court, in *Nagle v Rottnest Island Authority*, held that the defendant breached its duty by not warning of the risks of diving those whom it had encouraged to swim at a nature reserve.[118] Although the plaintiff was generally aware of the presence of rocks, the danger posed by the particular rock concerned was considered partially 'concealed'[119] or 'hidden'[120] by the effects of the sun on the water which obscured one's observation and appreciation of its

[113] As, for example, the vulnerable plaintiffs were in *Perre* where the defendant's acts occurred outside the plaintiffs' lands and without their knowledge, and therefore could not be protected against by them (1999) 198 CLR 180, 216, 235; cf the majority in *Vairy* who concluded that the water's variable depth was readily discoverable by one contemplating diving: see, eg, (2005) 221 ALR 711, [161] (Hayne J).
[114] (2005) 221 ALR 711, [222]. See also [223-4].
[115] (2005) 222 ALR 631, [73]. See also [74-6]; above n 70 and accompanying text. His Honour was however in the minority.
[116] *Wilkins v Council of the City of Broken Hill* [2005] NSWCA 468, [19] ('*Wilkins*'). Whilst breach was established upon the basis of a failure to enforce a prohibition on diving, not a failure to warn, causation could not be shown.
[117] See also above n 28-31and accompanying text.
[118] (1993) 177 CLR 423, 429-32 (Mason CJ, Deane, Dawson and Gaudron JJ. Brennan J dissenting).
[119] *Swain* (2005) 213 ALR 249, [139] (Gummow J).
[120] *Romeo* (1998) 192 CLR 431, 453 (Toohey and Gummow JJ), 481 (Kirby J); *Prast* [2000] WASCA 274, [30], [32] (Ipp J).

presence.[121] Additionally, whilst the plaintiff could have avoided the glitter by moving his head (but had instead simply assumed that the ledge on which he stood, forming a natural platform, was suitable for diving), the Court held that due allowance must be made for inadvertence[122] when determining breach and standard of care.[123] Consequently, at common law, just as the obviousness of a risk of injury is not determinative against liability[124] neither, at least traditionally, is a claimant's failure to take reasonable care for their own safety – although such failure may result in a contributory negligence claim.

This part, considers the interaction between obvious risk and claimant inadvertence in recent common law cases concerning occupiers' liability for failure to warn – firstly when determining breach and secondly, when setting the standard of care according to the status and position of the occupier *vis-à-vis* the entrant. Particular attention is paid to an analysis of the High Court's jurisprudence in *Vairy v Wyong Shire Council*; *Mulligan v Coffs Harbour City Council*; and more generally *Neindorf v Junkovic.*

A *Breach of Duty*

Heard together, *Vairy v Wyong Shire Council* and *Mulligan v Coffs Harbour City Council* concerned the extent to which occupiers, or those in control, of recreational land and waterways, are required to warn of latent "natural" defects. In both instances damages claims were commenced against authorities vested with the management and care of public land or premises, and included, in part,[125] an alleged "failure to warn" adult persons of the risks of injury associated with diving into waters too shallow, or of variable or unknown depth. At trial it was accepted that each claimant was owed a duty of reasonable care to protect him against unnecessary risks of physical harm.[126] However, whilst a breach of that duty was found in *Vairy*, none was found in *Mulligan*. The Court of Appeal's decision,[127] in allowing an appeal in *Vairy* only, was confirmed by the High Court which held that, determined prospectively in the circumstances of each individual case,[128] no obligation to warn existed.

1 *Vairy*

The appellant in *Vairy* was rendered a tetraplegic when, aged 33, he dove from a rock platform close to a popular surfing beach and struck his head on the sea bed.

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[121] *Nagle* (1993) 177 CLR 423, 427-8, 433 (Mason CJ, Deane, Dawson and Gaudron JJ); cf 441-3 (Brennan J); *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* [2004] NSWCA 247 (Tobias JA. Mason P concurring) which argues that 'no question of the obviousness of the risk of injury from diving into partially obscured water played any part in their Honours' consideration of breach of duty', rather this explanation of *Nagle* has been proffered by subsequent judicial decision (at [71]. Also [90-5], [101-5]).

[122] (1993) 177 CLR 423, 428, 431.

[123] *McLean v Tedman* (1984) 155 CLR 306, 311-2 ('*McLean*'); *Bus* (1989) 167 CLR 78, 90; *Swain* (2005) 213 ALR 249, [137].

[124] See above n 19-20 and accompanying text.

[125] Although the Council's liability for failing to "prohibit" diving from the platform was also considered in *Vairy* (see, eg, (2005) 221 ALR 711, [81], [84-7], [92], [164-5], [219]), this article focuses only upon failure to "warn" liability.

[126] *Vairy v Wyong Shire Council* [2002] NSWSC 881 (Bell J); *Mulligan v Coffs Harbour City Council* [2003] NSWSC 49 (Whealy J); aff'd *Vairy* (2005) 221 ALR 711, [1], [20], [74], [108-9], [200-1]; *Mulligan* (2005) 221 ALR 764, [16], [29], [50].

[127] *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* [2004] NSWCA 247 (Mason P and Tobias JA. Beazley JA dissenting).

[128] *Vairy* (2005) 221 ALR 711, [2-3], [6], [20-1], [28], [79], [118], [124-9]; *Mulligan* (2005) 221 ALR 764, [22], [50].

Although he had not dived from the platform before, on the day in question many other people had done so without injury. Such diving was a popular activity and had been occurring at the location for years. It was known to the respondent Council and had resulted in similar injury in the past. The appellant was familiar with the locality, being a frequent visitor in summer, and therefore did not attempt to assess the water's depth before diving, but instead followed common practice. It was the 'place to go, to dive … jump in or whatever.'[129]

The majority (Gummow, Hayne, Callinan and Heydon JJ), accepted as "common knowledge" or "apparent" that the level of the ocean floor may and does change due to the movement of sand caused by current and wind, such that 'the respondent could reasonably expect that a person of the appellant's age, knowledge and experience would not need a warning that to dive from the platform could be a dangerous thing to do.'[130] No danger of which the Council knew or ought to have known, that was not also plain to a visitor, existed.[131] In finding that the Council did not breach its duty of care by failing to erect signs warning of the foreseeable dangers of diving, should the water prove too shallow, the majority also considered relevant the:[132]

- Geographic reach of the Council's responsibilities over 27 km of coastline and the multiplicity of dangers attending that area such that the imposition of an obligation to warn in respect of the diving risk in question required assessment against its implications for all other risks, and all other forms of recreation, at each place they may occur.[133] Further, there was nothing to distinguish the danger at the platform from the other areas of coastline, under the Council's control, from which people may dive or plunge into the sea;
- Low probability of serious injury occurring, given the large numbers using the platform to dive;
- Appellant's voluntary engagement in a physical recreational activity;[134] and
- Council's lack of control over the risk, such that it could not be said to have been created or promoted by them.[135] Rather the water's variable depth was solely caused by the natural phenomena of littoral drift, tide and swell.

The minority (Gleeson CJ, McHugh and Kirby JJ), in holding that the Council had acted unreasonably in breach of its duty, concluded that, although diving was fraught with a foreseeable risk of serious injury, the activity's popularity at the location in question increased the danger by creating a misleading appearance of safety, obscuring its obviousness and making it a trap for the unwary:[136]

> The evidence established that despite the danger lurking below the seductive waters lapping the rock formation … many young people dived from the platform into the ocean … the continual stream of diving without incident must have made diving from the platform seem no more dangerous than diving from a 3 m springboard in a standard Olympic-sized pool. It is one thing to know that diving into water of unknown depth may cause injury. But a different area is reached

[129] (2005) 221 ALR 711, [11].
[130] Ibid [217] (Callinan and Heydon JJ). See also [80], [187] (Gummow J).
[131] Ibid [131], [161] (Hayne J).
[132] Ibid [80], [88-92], [100] (Gummow J), [122], [130-2], [135], [148-61], [164-5] (Hayne J), [214-5], [218-9], [225] (Callinan and Heydon JJ).
[133] See further below n 211-215 and accompanying text.
[134] See further below n 182 and accompanying text.
[135] And consequently lead to a higher standard of care: see, eg, below n 194 and accompanying text.
[136] (2005) 221 ALR 711, [10], [12-3] (Gleeson CJ and Kirby J), [33], [47] (McHugh J).

> when large numbers are known to dive into the water without apparent harm. If the water does contain a risk of injury, its apparent safety will make it a trap for the unwary. When such a situation arises it is almost always imperative for the controller of the land to warn swimmers of the danger.[137]

Accordingly, their Honours considered significant that whilst in the context of an expectation that persons take reasonable care for their own safety, 'the obviousness of a danger can be important in deciding whether a warning is required,'[138] in the circumstances of the case, reasonableness required a warning to inform the claimant of a risk which might otherwise be overlooked. For as stated by Kirby J in *Woods v Multi-sport Holdings Pty Limited*, 'warnings are sometimes required … to alert those who are inattentive, distracted or unlikely in the circumstances to consider the risk, although objectively, and with hindsight it is "obvious".'[139] Here therefore, from the viewpoint of a reasonable person in the position of the plaintiff, the common practice hid the obvious risk generally associated with diving into water of unknown depth and consequently increased the potential for claimant inadvertence, or their failing to take care for their own safety due to a misjudgement of the danger or belief that it was safe to dive.

In addition to the 'likelihood that inadvertence, familiarity with the area or constant exposure to the risk will make those coming into contact with the risk careless for their safety,'[140] the minority was influenced by the fact that (in their view):[141]

- The Council knew of the common practice, yet allowed it to continue although it also knew of the significant variations in the depth of the water adjacent to the platform (given the existence of a previous diving accident at that location) and therefore was armed with knowledge of the danger "at this spot" that entrants may not have;
- The platform's accessibility to the public attending the beach distinguished the area of coastline in question from the others under the Council's control, in that no other area exposed divers to as high a probability of injury occurring;
- The volume of people regularly using the area for diving increased the probability of serious injury occurring; and
- A warning was a simple and inexpensive precaution which, if given, would have brought the risk of diving to the appellant's attention.

2 *Mulligan*

The High Court's decision in *Vairy* also informed its reasons in *Mulligan*.[142] Here the appellant was swimming in a tidal estuary when he dove forward into a channel and hit his head on an elevated sand bedform, breaking his neck. Although the channel was artificially created, the risk in issue arose from naturally occurring undulations on its floor.[143] Prior to the accident the appellant, who was vacationing in Australia from

[137] Ibid [41] (McHugh J). See also [42].
[138] Ibid [7] (Gleeson CJ and Kirby J). See also [8].
[139] *Woods* (2002) 208 CLR 460, 500. See also *Swain* (2005) 213 ALR 249, [142] (Gummow J).
[140] (2005) 221 ALR 711, [40] (McHugh J).
[141] Ibid [13-5] (Gleeson CJ and Kirby J), [18], [33-42], [47] (McHugh J). See also *Mulligan* (2005) 221 ALR 764, [2] (Gleeson CJ and Kirby J).
[142] *Vairy* (2005) 221 ALR 711, [53] (Gummow J), [167] (Callinan and Heydon JJ). *Mulligan* (2005) 221 ALR 764, [1] (Gleeson CJ and Kirby J), [15] (McHugh J), [49] (Hayne J), [71] (Callinan and Heydon JJ).
[143] (2005) 221 ALR 764, [4], [9], [12], [53], [68], [82].

Ireland, had been swimming in the area for half an hour and had dived into the channel six or seven times in order to "ride" it out to the sea.

The High Court[144] unanimously concluded that although injury of the kind sustained by the appellant was reasonably foreseeable, reasonableness did not require signage warning against diving or that the channel may be too shallow. In doing so they relied primarily on the basis that the danger that materialised was not unusual, and existed at virtually every Australian beach, and in most waterways, such that it was 'difficult to see how such common dangers can be addressed by particular warnings at particular locations.'[145] Although confirming that the obviousness of a risk is not automatically determinative against a requirement to warn, in *Mulligan* the risk's obviousness was effectively conclusive because in the circumstances all other factors relevant to liability[146] were insufficient to outweigh it.

For example, McHugh J held that a public authority's standard of care was that which could reasonably be expected given the condition of the land or premises and the character of the entrants as a class.[147] However, this did not mean that a warning was required because (as argued by the appellant) the respondents had 'to have in mind a whole variety of human nature who might resort to the area, including, children, teenagers, *persons unfamiliar with the area (tourists)*, even the foolhardy.'[148] Notwithstanding that the appellant was unfamiliar with Australian conditions and creek swimming[149] according to his Honour, and Callinan and Heydon JJ, such considerations did not require a different conclusion as:

> swimmers generally are aware that there are widespread variations in the depths of creeks and rivers and that, unless the water is deep enough for any particular dive, there is an ever present risk that part of the diver's body will strike the [bottom] … The risk … is well known and likely to be present in the mind of the swimmer at all times. Ordinarily, the occupier or controller of a creek or river bed is not acting unreasonably if that person does not erect a sign warning of the danger.[150]

Furthermore, in *Vairy* McHugh J opined that:

> whether a warning is a reasonable response to a perceived risk of harm depends on a number of factors. In a small number of cases, the obviousness of a risk may not require a warning. But ordinarily that will be because the magnitude and likelihood of the risk are both so insignificant and so relatively expensive or inconvenient to avoid that reasonable care requires neither the elimination, nor a warning concerning [its] propensity … Exceptionally, there may also be cases where the risk is so well known and so likely to be present in the minds of those who are likely to come into contact with it that a defendant does not act unreasonably in failing to warn of it.[151]

Consequently, whilst 'the greater the magnitude of the risk [obvious or otherwise] or the greater the probability of injury, the more likely it is that a warning will be

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[144] Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.
[145] (2005) 221 ALR 764, [6] (Gleeson CJ and Kirby J). See also [24-6] (McHugh J), [31-2], [38] (Gummow J), [52-3] (Hayne J), [72], [79] (Callinan and Heydon JJ).
[146] Ibid [52-3] (Hayne J), [78], [83] (Callinan and Heydon JJ), such as the: Council's promotion of the area, encouragement and knowledge of the channel's use, and knowledge of its variable depth; age and general inadvertence of entrants; magnitude of the risk; and inexpensiveness and simplicity of erecting signs.
[147] Ibid [21].
[148] Ibid [23] (McHugh J) (emphasis added). See also [79] (Callinan and Heydon JJ).
[149] Ibid [31], [68].
[150] Ibid [24-5] (McHugh J).
[151] (2005) 221 ALR 711, [46]. See also [19].

required,'[152] according to McHugh J, in *Mulligan*, where the appellant plunged forward from standing position in circumstances where the risk of striking the creek bed was "so" obvious, the risk of injury from an entrant choosing to do so was so remote that no warning was required. Therefore, in such cases, in order to avoid a finding that they should have behaved more responsibly, plaintiffs will need to distinguish the risk, of which they are claiming a failure to warn, from one that even as a tourist, or having regard to their age and alike, they should have known. Nevertheless the situation may be different[153] if persons are "habitually diving" from heights into shallow water (like in *Vairy*),[154] or in respect of dangers not normally confronted when swimming[155] - there the probability of the risk materialising arguably increases as its obviousness decreases.

Interestingly therefore given these statements by McHugh J, although it was common for people to dive into the channel to ride the current, and the appellant had observed this practice and had previously dove safely himself,[156] the minority who considered similar evidence as detracting from the obvious risk and leading to inadvertence in *Vairy*, did not consider this issue in *Mulligan*. It is acknowledged however that the degree of the appellant's observance of the common practice in *Mulligan*, being restricted to the day in question, was more limited than that in *Vairy* where the appellant had been a frequent visitor over a number of years. Justices Callinan and Heydon however opined that '[t]he fact that a potentially dangerous act may have been completed without mishap previously, even frequently, can never provide an assurance that it will always be able to be completed safely.'[157]

3 *Effect*

The High Court's decisions in *Vairy v Wyong Shire Council* and *Mulligan v Coffs Harbour City Council* confirm the policy notions of individual autonomy, vulnerability and personal responsibility underpinning the determination of an occupier's liability for failure to warn. Thus whether a risk, in those cases of diving into water of unknown depth, is so obvious that a reasonable person in the plaintiff's position would not choose to incur it and would not require notification of the risk to enable informed choice (or would be in just as good a position as the defendant to protect against it), will be relevant to determining the reasonableness of any response to a perceived risk of harm. They also confirm that whether a warning is reasonable continues to depend upon a number of factors.[158] However, the inconsistent treatment afforded to the interplay between obvious risk and claimant inadvertence (which differed even as between the same judges in these cases), suggests that the weight to be given to any one factor, requires a normative judgement depending upon the circumstances. That this is bound to lead to different judicial interpretations, on the same facts, of what is relevant or reasonable, with adverse results for legal "certainty" or "predictability," was

[152] *Mulligan* (2005) 221 ALR 764, [25] (McHugh J). See further above n 70-73 and accompanying text.
[153] See generally ibid [25-6] (McHugh J), [31-8] (Gummow J).
[154] At least according to the minority judgements.
[155] For example: stormwater pipes extending into the surf (*Bennett* [2006] NSWSC 242, [78]); and ordinary risks made worse by the particular configuration of an area – such as where water suddenly becomes much shallower (*Prast* [2000] WASCA 274, [29-32], [43]).
[156] *Mulligan* (2005) 221 ALR 764, [11], [51], [58], [61], [72].
[157] Ibid [81].
[158] Such as those referred to at above n 21-27 and accompanying text.

anticipated by Gummow J in *Vairy* who concluded that: 'where the application of normative standards to a given set of facts is required of a judge, so much more pressing is the need for reasoning which displays soundness and cogency.'[159]

Relevant perhaps to the High Court's treatment of inadvertence caused by observance of the common practice in *Vairy* and *Mulligan*, and detracting from its consideration by some in the context of the obscuring of an otherwise obvious risk, was the focus given in those cases, to the individual plaintiffs' subjective knowledge of the risk. For example, the Court of Appeal had stated:

> the fact that Mr Mulligan on the one hand, and other people to Mr Vairy's observation on the other, had dived safely on other occasions did not neutralise or otherwise detract from the obvious risk of diving into water of unknown depth particularly where each was aware that the water depth was variable, that that variability related (at least in part) to the condition of the seabed … and that each well knew that it was dangerous to dive into water of variable depth.[160]

Berrigan Shire Council v Ballerini[161] and *Consolidated Broken Hill v Edwards*[162] confirm the influence attached to the fact that the depth of the water was unknown, yet "known," at least generally,[163] by the claimants to be variable. Indeed according to the Court of Appeal, the plaintiffs' subjective knowledge 'made' the risk obvious.[164] Similarly, in *Mulligan*, the High Court referred to the claimant's cautious approach to diving and the attempts made by him to ascertain the water's depth, referring to statements that he had 'found that the creek went from "quite shallow down to his thighs fairly quickly"';[165] and that he knew that the water was of variable depth and that it was generally risky to dive in such conditions – he just did not realise how variable it was.[166] In *Vairy*, the Court of Appeal considered:

> that the appellant had seen others dive without mishap on numerous occasions may have detracted from the obviousness of the risk … but the appellant, having regard to his knowledge of the serious injury suffered by a relative in an earlier diving accident, should have been especially cautious and careful.[167]

Following from this, Callinan and Heydon JJ in the High Court opined that it was 'not without significance that according to the appellant, he had never dived there before, and had on other occasions chosen to enter the water from the platform in what clearly was a more cautious manner' – by sitting on the edge and rolling backwards into the water.[168] According to their Honours, the appellant's submission as to his observance of the common practice of diving in the area, both on the day of his injury and before, said 'as much against the appellant's case as it [did] for it.' Relevant to any warning's

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[159] (2005) 221 ALR 711, [97].
[160] *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* [2004] NSWCA 247, [209] (Tobias JA. Mason P concurring). Also, [206]; *Mulligan v Coffs Harbour City Council* [2003] NSWSC 49, [293] (Whealy J): the plaintiff knew the water was of variable depth and that it was generally risky to dive in such conditions, he just did not realise "how variable".
[161] [2005] VSCA 159, [53].
[162] [2005] NSWCA 380, [41]. See also *Vairy* (2005) 221 ALR 711, [48-9] (McHugh J).
[163] *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* [2004] NSWCA 247, [210-1]. There was no finding that Vairy was specifically aware of the water's variability.
[164] Ibid [201], [206] (Tobias JA. Mason P concurring).
[165] (2005) 221 ALR 764, [14] (McHugh J), [62-3] (Callinan and Heydon JJ).
[166] Ibid [4]. See also [31], [67] (referring to statements made at trial in *Mulligan v Coffs Harbour City Council* [2003] NSWSC 49).
[167] *Vairy* (2005) 221 ALR 711, [207] (Callinan and Heydon JJ) referring to *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* [2004] NSWCA 247, [209-11] (Tobias JA. Mason P concurring).
[168] *Vairy* (2005) 221 ALR 711, [217]. See also [178].

likely effect, in finding no requirement to warn, they concluded that the conduct 'demonstrated that people will continue to do it, and are not deterred.'[169] Further in denying an allowance for inadvertence, Callinan and Heydon JJ stated:

> the dividing line between *inadvertence* and *negligence*, indeed even gross negligence, can be very much in the eye of the beholder, and is often assessed almost entirely subjectively. This was, on no view however, a case of mere inadvertence. It was a very clear duty of the appellant, and one which any responsible authority would expect him to fulfil, to make some soundings at least of depth, and accordingly of risk to himself before diving from the platform.[170]

Given the common practice of diving evident on the facts in both *Mulligan* and *Vairy*, such a conclusion appears inconsistent with the well established notion upheld in *Nagle* that one 'who owes a duty of care to others must take account of the possibility that one or more persons to whom the duty is owed might fail to take proper care for his or her own safety.'[171] Indeed, it runs against prior authority, to suggest that inadvertence and (contributory) negligence are mutually exclusive in this manner.[172] Furthermore, in determining whether the respondents' duty of reasonable care required the erection of a warning, to the extent that the court(s) were influenced by the appellants' knowledge of the risks, devoid from the knowledge of a reasonable person, this also illustrates error. As an assessment of reasonableness and "obviousness" is to be determined objectively, such a subjective assessment of risk alone (unless also reflective of the knowledge of a reasonable person in that position), is irrelevant to the discharge a defendant's duty.[173] Consequently, as questions of obviousness and breach are not dictated by a claimant's state of mind but rather appropriate standards of behaviour,[174] in *Bennett v Manly Council and Sydney Water Corporation* the defendants were held to have breached their duty by failing to warn of the position of stormwater pipes extending into surf after the plaintiff body-surfed into them. The plaintiff's knowledge of the pipes generally did not prevent them from being categorised as non-obvious, or an 'unusual risk' – there being only two other Australian beaches with similar stormwater outlets. Swell also concealed one's observation of their position whilst at sea.[175]

Therefore, and consistently with diving cases which have raised similar issues,[176] it is argued that the common practice, and its effect upon claimant inadvertence by obscuring the obviousness of the risk of diving into water of unknown depth, ought to have been considered more closely by the High Court in *Mulligan* and the majority in *Vairy*. Irrespective of a particular claimant's knowledge of water's variable depth (and

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[169] Ibid [219].

[170] Ibid [222] (emphasis added). See also *Mulligan* (2005) 221 ALR 764, [72], [83]; *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* [2004] NSWCA 247, [212] (Tobias JA. Mason P concurring).

[171] (1993) 177 CLR 423, 431 considered at above n 118-122 and accompanying text.

[172] 'Where inadvertence, even inadvertence amounting to contributory negligence, is itself a foreseeable possibility the duty … extends to the … risk of injury by inadvertence': *Bus* (1989) 167 CLR 78, 92 (Gaudron J). See also 90-1; *McLean* (1984) 155 CLR 306, 311; *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24, 33 ('*Sungravure*').

[173] See, eg, above n 9 and 86 and accompanying text; *Vairy* (2005) 221 ALR 711, [49] (McHugh J), [163] (Hayne J); *Mulligan* (2005) 221 ALR 764, [18], [22] (McHugh J). See also, Lunney, above n 84, 83-5.

[174] *Sungravure* (1964) 110 CLR 24, 38; *Port Stephens Council v Theodorakakis* [2006] NSWCA 70, [13].

[175] [2006] NSWSC 242, [10], [14-28], [78]. This failure caused the plaintiff's injury as despite his *general knowledge* of the pipes' presence, a sign would have alerted him to their *exact position* whilst in the water, such that he would not have 'sought to come ashore in [their] vicinity' (at [60]).

[176] See, eg, *Berrigan* [2005] VSCA 159 and *Wilkins* [2005] NSWCA 468 discussed respectively at above n 58 and 116 and accompanying text. Although not determinative, as breach must be decided on the circumstances of each individual case, such cases still provide guidance as to the relevant principles involved and are therefore entitled to respect: *Vairy* (2005) 221 ALR 711, [2-3], [20-1], [28], [30-2], [56], [118], [208-9].

whether this is attributed to the hypothetical referee), in appropriate cases, reasonable entrants may generally still be misled by such a practice and, as a consequence, the area's apparent safety to dive. Such an approach to breach would better preserve the duty of care owed to entrants, by focusing more appropriately upon the defendant occupier's conduct, or what they knew or ought to have known concerning risks given the likely knowledge of entrants generally, whilst still allowing a reduction of damages on account of the claimants' own conduct, as warranted, on the basis of contributory negligence[177] or voluntary assumption of risk.[178] Furthermore, in addition to the practice itself, an occupier's allowance of a practice to develop, may also give rise to an assumption, in the mind of a reasonable person, that the practice is safe, such that a warning is required. For example in *Vairy*, the Council, did not actively promote the platform's use in entering the water, but instead provided a patrolled beach nearby.[179] Nevertheless, in failing to post signs warning of the dangers of platform diving, particularly given their knowledge of the practice and its associated risks, they might objectively be viewed as passively promoting the activity's appropriateness at that location.

In reality however, the weight given to the interplay between the obviousness of a risk and claimant inadvertence may ultimately depend upon the judicial emphasis afforded to personal responsibility, autonomy and vulnerability. For example, in *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council*, the majority of the Court of Appeal referred normatively to current community perceptions of the reasonableness of a defendant's conduct and were influenced by the 'shift towards personal responsibility for one's conduct, especially in the context of sporting and recreational pursuits where the risk of injury is obvious'.[180] Such emphasis, upon a claimant's personal responsibility, led to the conclusion that it would be unreasonable to impose a duty to warn upon the defendants by allowing Vairy and Mulligan to rely on their own inadvertence as grounds for ignoring the obvious risk otherwise generally associated with diving into water of variable or unknown depth:

> given the obvious nature of the risk, he could not assume that there was no such risk merely because of his observation of the foolhardy actions of others. The adoption by him of the assumption that it was safe to dive because of his observations caused him to ignore a risk that was otherwise obvious … it would not be reasonable to impose [a duty] … in these circumstances.[181]

In the High Court, Callinan and Heydon JJ in *Vairy* similarly confirmed that any duty owed 'was conditioned very much by the fact that the appellant [by voluntarily entering the platform for the purpose of recreational diving] set out to extend himself physically … against the elements, in particular, the sea' in a way known to be dangerous.[182] As

[177] Some states now provide for a reduction in damages, on account of contributory negligence, of up to 100 percent: see, eg, *Civil Liability Act 2002* (Qld) s 24; *Civil Liability Act 2002* (NSW) s 5S; *Wrongs Act 1958* (Vic) s 63; *Civil Law (Wrongs) Act 2002* (ACT) s 47. However, even here, as contributory negligence is determined according to the conduct of an objective or reasonable person, a claimant's subjective knowledge of a risk is only relevant to establish what a reasonable person in the same position would have done: see, eg, Lunney, above n 84, 85-6.
[178] Although a complete defence, here the claimant's subjective knowledge of the risk is relevant: see above n 93 and accompanying text.
[179] (2005) 221 ALR 711, [83], [152].
[180] [2004] NSWCA 247, [157] (Tobias JA. Mason P concurring). See also [23-4], [69], [148], [152], [158]; discussion at above n 54-59 and accompanying text.
[181] Ibid [211]. See also [212-3].
[182] (2005) 221 ALR 711, [216]. See also [217].

discussed above,[183] they also opined that no allowance should be made for inadvertence, rather the appellant had a duty to make some soundings at least of depth, and accordingly of risk to himself before diving from the platform. The minority however, who viewed the common practice of diving as detracting from the obvious risk and leading to inadvertence, were more influenced by the premise of ensuring that the risks faced by individuals be informed.[184] For example, McHugh J opined that:

> Given that the Council … permitted diving to continue at this spot, despite its knowledge of the dangers, reasonable care required that it give a warning to those who did not have the Council's knowledge or who had become desensitised to the risk.[185]

On the other hand, although not explicitly mentioned, vulnerability arguably influenced Beazley JA's dissenting judgement in the Court of Appeal in *Vairy.* Here, in finding the defendant in breach of their duty of care, his Honour infers that 'whilst it is correct to say that diving from a rock into the ocean is inherently dangerous',[186] in the circumstances the otherwise obvious risk of doing so was obscured as people commonly 'assumed it was safe to dive … [because they] saw other people diving.'[187] Accordingly, the claimant was vulnerable due to a lack of appreciation of the risk (known to the defendant). Vairy's vulnerability was arguably further enhanced as, according to his Honour, 'it was not possible to gauge the depth of the water by observation from the rock platform' independently from observing whether others were diving.[188] Nevertheless, in the High Court, Callinan and Heydon JJ infer that Vairy was not vulnerable.[189]

It is apparent therefore, that there may be different approaches to the degree to which the possibility of claimant inadvertence should be taken into account when determining questions of reasonableness and obviousness for the purpose of ascertaining an occupier's liability for failure to warn.

B *Standard of Care*

The status and position of an occupier *vis-à-vis* an entrant are considerations relevant to a judgement about what reasonableness requires of a defendant. Therefore, whilst in any given case, whether a warning sign is a reasonable response to a perceived risk of harm will be determined by the same calculus of factors considered above,[190] they must be applied at, common law, with regard to the standard of care appropriate to the nature of the premises entered or the character and purpose of the relationship between the parties.[191] Consequently, as illustrated below, such differing standards of care will arguably affect the weight given, in the context of breach, to the factor of claimant inadvertence, misjudgement or carelessness.

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[183] See above n 170 and accompanying text.
[184] See above n 136-138 and accompanying text.
[185] *Vairy* (2005) 221 ALR 711, [42].
[186] *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* [2004] NSWCA 247, [12].
[187] Ibid [9]. See also [3], [11-2].
[188] Ibid [12].
[189] See above n 114 and accompanying text.
[190] See above n 21-27 and accompanying text.
[191] *Romeo* (1998) 192 CLR 431, 478-9; *Thompson* (2005) 214 ALR 452, 458.

1 *Nexus Between Inadvertence and Party Status and Position*

In the case of contractual entrants, a higher standard, 'although not a duty of insurance against any risk of injury'[192] is owed to ensure that the premises are as safe for the mutually contemplated purpose of entry as reasonable care and skill can make them.[193] Similarly, the standard expected of an occupier increases where the premises' risk is not naturally occurring, but rather is created by them.[194] Occupiers, who are also employers, additionally owe a higher standard of care to their employees than a mere occupier of private land.[195] However, by comparison, the standard of response required by a public authority is generally lower.[196] This is because, compared to occupiers of private residential or commercial premises – where entrants are generally present with the permission and in the interests of the occupier, who is entitled to control or forbid their entry if desired, and whose obligations and control are generally confined to a smaller area where hazards may be more easily identified and neutralised[197] – public authorities: are 'not (in practice at least) in a position to protect themselves from incurring liability for harm by withdrawing entirely'[198] from the performance of their functions. They therefore have 'little effective control'[199] of public access to facilities or areas once created, yet are responsible for maintaining a broad geographical area and a range of competing statutory objects or activities. Furthermore, as they must act in the interest of the community as a whole, to whom they are politically responsible, individual interests must 'be balanced against a wider public interest, including the taking into account of competing demands on resources of the public authority.'[200] The relevance, to the existence or breach of a public authority's duty of care, of the fact that any functions required to be exercised are limited by: the financial and other resources reasonably available to the authority for that purpose; and the broad range of the authority's activities, has been legislatively confirmed.[201]

Given then that the standard of care owed differs as between occupiers, it has been stated that:

> what should be regarded as reasonable care for their own safety and as acceptable *inadvertence* on the part of entrants to retail premises … is likely overall to be less exacting of them than what is regarded as reasonable care for their own safety on the part of persons exercising their legal rights to use [premises or lands] over which public authorities have powers of maintenance and

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[192] *Hoyts* (2002) 201 ALR 470, 478 (Kirby J).
[193] Ibid 477-8, 480-1; *Woods* (2002) 208 CLR 460, 473, 481, 492, 497, 501.
[194] *Brodie* (2001) 206 CLR 512, 539-40; *Dederer* [2006] NSWCA 101, [226].
[195] An employer's compliance with its duty of care to an employee is 'not to be measured by reference to the reasonableness of imposing on an occupier of land an obligation to warn members of the public about the obvious risks on the land': *Czatyrko* (2005) 214 ALR 349, 353 (Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ). See also *Pascoe v Coolum Resort P/L* [2005] QCA 354, [17-9], [20], [28] ('*Pascoe*').
[196] See, eg, *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 394-5 and *Consolidated Broken Hill v Edwards* [2005] NSWCA 380, [56] which confirm that the standard of care owed by a government agency may be less than that owed by a private party (or public company).
[197] See generally, *Neindorf* (2005) 222 ALR 631, [37], [59-61], [78]; *Junkovic v Neindorf* [2004] SASC 325, [25].
[198] Ipp Report, above n 16, [10.17-18].
[199] *Brodie* (2001) 206 CLR 512, 605. See also 625-6; *Romeo* (1998) 192 CLR 431, 488.
[200] Spigelman, 'Negligence and Insurance Premiums: Recent Changes In Australian Law' (2003) 11 *Torts Law Journal* 1, 19. Also *Romeo* (1998) 192 CLR 431, 454-5, 480-1, 491.
[201] *Civil Liability Act 2003* (Qld) s 35; *Civil Liability Act 2002* (NSW) s 42; *Civil Liability Act 2002* (WA) s 5W; *Civil Liability Act 2002* (Tas) s 38; *Wrongs Act 1958* (Vic) s 83, *Civil Law (Wrongs) Act 2002* (ACT) s 110. See also, for example, *Civil Liability Act 2003* (Qld) s 10(a); *Civil Liability Act 2002* (NSW) s 5C(a). A detailed discussion of these reforms is outside the scope of this article.

> repair imposed by public law. The relationships are completely different, and *the calls for self-regarding vigilance are different*.[202]

Similarly in *Brodie v Singleton Shire Council*, whilst recognising that the level of reasonable care expected is related to the obviousness of a risk of injury,[203] Gaudron, McHugh and Gummow JJ opined that, in the context of a public authority occupier:

> In dealing with questions of breach of duty, whilst there is to be taken into account as a "variable factor" the results of "inadvertence" and "thoughtlessness", a proper starting point may be the proposition that the persons … will themselves take ordinary care.[204]

Consequently, in determining an occupier's liability for a failure to warn of a risk of injury, the judicial tolerance or consideration afforded to claimant inadvertence or carelessness appears proportionate to the strength of the standard of care owed.[205] For example, although a higher standard of care is owed to commercial or contractual entrants, in *Neindorf v Junkovic* the majority, who gave no consideration to claimant inadvertence, inferred that whilst 'borderline between commercial and social activity,'[206] an informal garage sale was 'far removed from the selling of goods on a daily basis'[207] so as to be insufficiently commercial in this sense. However in dissent, Kirby J considered that the parties' relationship 'was one established by the appellant's invitation to the public to do business with her from which the appellant stood to make a modest economic gain' such that a higher standard of care could be expected,[208] and *"was"* influenced by the coincidence of an obvious risk and the respondent's inadvertence, stating:

> Most people do not normally walk, even on unfamiliar surfaces, looking constantly at their feet. The fact that there was a division in the slabs of concrete in the appellant's driveway was obvious. But the distinct unevenness in surface levels of the adjoining slabs may not have been obvious to a person, like the respondent, who had no warning of it and no reason to anticipate it. Especially if … distracted [by the items displayed for sale] … the chances of overlooking the danger or "hazard" … was great.[209]

A greater focus upon the lower standard of care owed by a public authority, as opposed to a private land owner, in relation to a naturally occurring risk,[210] may therefore further explain why the majority of the High Court in *Vairy* was not influenced by the common practice of diving as distracting from the otherwise obvious danger of plunging into water of variable or unknown depth, and leading to claimant inadvertence.

In *Vairy*, the defendant's status as an authority, with statutory power and responsibility for managing large areas, together with the nature of the land and its right of public access, were identified as circumstances relevant to a judgement about the

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[202] *Turnbull v Alm* [2004] NSWCA 173, [43] (Bryson JA. Giles and Tobias JJA concurring) (emphasis added); aff'd *Bartolo v Owners of Strata Plan No.10535* [2005] NSWCA 256, [33] (Santow JA. Tobias and McColl JJA concurring). Also *Pascoe* [2005] QCA 354, [20] (nexus between inadvertence and an employer's standard of care).
[203] (2001) 206 CLR 512, 581 (Gaudron, McHugh and Gummow JJ).
[204] Ibid 580 (citations omitted).
[205] This is further evidenced in *Dederer* [2006] NSWCA 101. Discussed at below n 265 and accompanying text.
[206] (2005) 222 ALR 631, [5] (Gleeson CJ).
[207] Ibid [117] (Callinan and Heydon JJ). See also [101].
[208] Ibid [66]. See also [62-5], [88].
[209] Ibid [76]. See also [27], [60]. See further, discussion at above n 39-42 and accompanying text.
[210] *Vairy* (2005) 221 ALR 711, [92] (Gummow J), [131], [161] (Hayne J).

reasonableness of its conduct.[211] Therefore, whilst it was necessary to take into account the Council's competing responsibilities and functions, together with the implications of liability for 'all forms of risk associated with all forms of recreation on or from land of which the council had the care, control and management'[212] and the 'multiplicity of dangers to which people are exposed when they attend beaches or rock headlands,'[213] this was, according to the minority, insufficient to displace the Council's obligation to deal with the particular danger at the particular place in question – especially given the 'continued practice of diving from the rock platform in conditions of established danger.'[214] Nevertheless, the majority, in comparison to plaintiff inadvertence, weighted the effect of liability upon the Council's competing responsibilities more highly, stating:

> That he observed others diving safely before diving himself, thus displaying a modicum of caution, does not make any more or less reasonable the Council's response to the multitude of apparent risks to which members of the public are exposed along the coastline … namely, its omitting to place along that coastline signs warning of all those risks.[215]

2 *Effect*

Consequently, in actions against public authorities, *Vairy* arguably illustrates, not only: the importance of distinguishing (in severity or danger) the alleged risk, of which a failure to warn is claimed, from the other "risks" within an authority's responsibility and control; but also the potential for factors influencing an occupier's standard of care to affect the weight afforded to claimant inadvertence.

Accordingly, in light of recent High Court jurisprudence and through an analysis of the interaction between obvious risk and claimant inadvertence, this part has argued that, in determining whether an occupiers' duty of reasonable care imposes an obligation to warn, whether a risk is obvious, and the relative weight afforded to the factors impacting upon this assessment (such as the potential for claimant inadvertence), is uncertain and hard to predict. Nevertheless the consideration afforded to inadvertence will arguably depend upon: firstly, whether a subjective perspective of risk is erroneously employed; secondly, the judicial emphasis afforded to the policy notions of personal responsibility, autonomy and vulnerability; and thirdly, the relevant standard of care, or the status and position of the occupier *vis-à-vis* the entrant. Whilst this is the position at common law, the impact of recent tort reform legislation upon an occupier's liability for obvious risks must also be addressed.

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[211] 'it was important to distinguish between an occupier of private land, and a local government': ibid [201]. Also [6-7] (Gleeson CJ and Kirby), [79] (Gummow J), [111-4] , [134], [145], [159-61] (Hayne J), [218] (Callinan and Heydon JJ). See generally *Mulligan* (2005) 221 ALR 764, [24] (McHugh J), [28] (Gummow J).

[212] *Vairy* (2005) 221 ALR 711, [160] (Hayne J). See also [122].

[213] Ibid [90].

[214] A similar diving accident had previously occurred at that location: see generally *Mulligan* (2005) 221 ALR 764, [2] (Gleeson CJ and Kirby J); ibid [37-8] (McHugh J).

[215] *Vairy* (2005) 221 ALR 711, [96] (Gummow J). See also [148-9], [156-61] (Hayne J), [218-9], [222] (Callinan and Heydon JJ).

IV OBVIOUS RISKS – LEGISLATIVE REFORMS

The recent tort reforms introduce a broad denial of liability relevant to an occupier's failure to warn of obvious risks, which is not limited to personal injury claims.[216] Although differing between the states, this legislation, in general terms provides that 'a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person suffering harm.'[217] The definition of "dangerous recreational activity" varies, but in all cases is defined to include 'an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm.'[218] In relation to non-recreational activities, and recreational activities that are not dangerous,[219] the legislation also negates 'a duty to another person to warn of an obvious risk.'[220] However, generally, this latter provision does not apply where:[221] information or advice concerning the risk is requested by the plaintiff; warning of the risk is required by written law; or the risk is one of personal injury or death arising from the provision of a "professional service".[222] Here a duty to warn, whilst not excluded, is also not presumed and therefore remains to be determined at common law. Additionally, as limited to liability on account of a failure to warn, this latter provision will not apply to exclude liability where a warning would be insufficient to meet the standard of reasonable care.[223]

These reforms, by negating a duty to warn of obvious risks, encompassing (in some

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[216] See, eg, *Civil Liability Act 2003* (Qld) sch 2 for the definition of "harm" used in ch 2, pt 1, divs 3 and 4 – which includes personal injury, damage to property, and economic loss.

[217] *Civil Liability Act 2003* (Qld) s 19; *Civil Liability Act 2002* (NSW) s 5L; *Civil Liability Act 2002* (WA) s 5H; *Civil Liability Act 2002* (Tas) s 20.

[218] *Civil Liability Act 2003* (Qld) s 18. *Civil Liability Act 2002* (Tas) s 19 also includes any sport (whether or not an organised activity), whilst *Civil Liability Act 2002* (NSW) s 5K and *Civil Liability Act 2002* (WA) s 5E in addition to any sport, includes: 'any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.' Additionally the Western Australian definition refers to 'a significant risk of harm' not limited to "physical harm".

[219] *Civil Liability Act 2003* (Qld) s 17(2); *Civil Liability Act 2002* (NSW) s 5J(2); *Civil Liability Act 2002* (WA) s 5G(2); *Civil Liability Act 2002* (Tas) s 18(2).

[220] *Civil Liability Act 2003* (Qld) s 15; *Civil Liability Act 2002* (NSW) s 5H; *Civil Liability Act 2002* (WA) s 5O; *Civil Liability Act 2002* (Tas) s 17; *Civil Liability Act 1936* (SA) s 38. Section 56 of the *Wrongs Act 1958* (Vic) has been discussed at above n 77-86 and accompanying text, and provides that for the purpose of establishing the breach of a duty of care in negligence on account of a failure to: warn about a risk of harm; or give other information, the plaintiff must prove, on the balance of probabilities, that they were not aware of the risk or information.

[221] *Civil Liability Act 2003* (Qld) s 15(2); *Civil Liability Act 2002* (NSW) s 5H(2); *Civil Liability Act 2002* (WA) s 5O(2); *Civil Liability Act 2002* (Tas) s 17(2); *Civil Liability Act 1936* (SA) s 38(2). In Western Australia this exclusion applies in relation to "dangerous recreational activities" also, if the plaintiff has requested advice or information about the risk; or if the defendant is required by written law to warn the plaintiff of the risk: *Civil Liability Act 2002* (WA) s 5H(3).

[222] In Queensland and Tasmania this "professional service" exclusion does not apply to doctors/registered medical practitioners. *Civil Liability Act 1936* (SA) s 38(2) limits the exclusion to 'a risk of death or of personal injury to the plaintiff from the provision of a health care service by the defendant.' "Health care service" is defined to include a diagnostic, therapeutic, or other service directed at maintaining or restoring health: s 3. The South Australian legislation also excludes from the operation of s 38 a requirement to warn mandated by an applicable code of practice in force under the *Recreational Services (Limitation of Liability) Act 2002* (SA). There, a registered provider of recreational services may enter into a contract with a consumer, or display a notice, modifying their duty of care so that it is dictated by the terms of a registered code setting out the measures that a service provider of the relevant kind should take to ensure a reasonable level of protection for consumers.

[223] See, eg, *Edwards v Consolidated Broken Hill Ltd* [2005] NSWSC 301, [19-25]; aff'd *Consolidated Broken Hill v Edwards* [2005] NSWCA 380, [58]. Here the risk of falling when riding a bicycle across a bridge, because of the narrow space existing beside parked rail cars, was obvious such that no duty to warn pursuant to s 5H of the *Civil Liability Act 2002* (NSW) existed. Nevertheless the defendant remained liable for allowing the cars to remain on the bridge. See also *Maloney* [2006] NSWCA 136, [102], [117], [171].

instances) all liability in negligence for harm associated with the materialisation of an obvious risk of a dangerous recreational activity, are therefore seemingly reflective of the common law policies of personal responsibility, vulnerability and individual autonomy discussed above. Where a warning would not provide an entrant with new information, or only with information which "being obvious" they ought to already possess, the legislation confirms that there is no obligation upon an occupier to warn of the risk in question. That a duty to warn is founded, in part, in preserving a claimant's decision-making autonomy is also evidenced by the circumstances excluded from the legislation's operation – request for information; warning required by written law; and provision of a professional service. The first and second instances expressly recognise the information's utility to the claimant's decision-making process. In the third instance, where the harm suffered is personal injury or death from the provision of a professional service (say health care), in many cases the very purpose of procuring the service may include the provision of information or advice concerning the risks of the treatment, again to enable rationally informed choice.[224] Accordingly, it has been stated that the legislation's effect may be 'to transform what was in effect a working presumption of fact that reasonable care does not require a warning about an obvious danger to a statutory stipulation that it does not.'[225] However, its operation may not be that simple.

At first glance, the legislation's ambit "appears" wider than the common law position. There a risk's "obviousness" is merely one factor to consider in determining whether an occupier's duty of care extends to an obligation to warn of it, and defendants should eliminate all risk, obvious or not, whenever on balance it is unreasonable not to do so.[226] By comparison, under the statutory formulation, obviousness is, at least in appearance, determinative. The legislation therefore seems to place renewed emphasis upon plaintiffs taking responsibility for their own actions, especially in the context of sporting and recreational pursuits where the risk of injury is obvious.[227] Indeed it has been stated that it should be judicially interpreted, in this light, with 'the express purpose … to limit the recovery of damages.'[228] It may therefore represent an important change of policy – focusing more upon a plaintiff's sole responsibility for obvious risks than the common law's traditional balancing of plaintiff and defendant rights.[229] Consequently the statutory provisions, in promoting greater claimant responsibility, may in fact be less respectful of an entrant's autonomy to choose their degree of risk exposure. This is particularly evident in those cases where previously it was acknowledged, as arguable, that although a risk was obvious, this was in the circumstances outweighed by factors requiring its disclosure, such as: the gravity of danger and the occupier's degree of control;[230] or entrant inadvertence.[231] However

[224] See, eg, *Rogers v Whitaker* (1992) 175 CLR 479, [12] where, in a claim based upon a doctor's failure to advise of the risks of treatment, the High Court confirmed that in determining the appropriate standard of care weight is to be given to 'the paramount consideration that a person is entitled to make his own decisions about his life.'
[225] Keeler, above n 90, 60.
[226] See, eg, *Vairy* (2005) 221 ALR 711, [44-6]; above n 20 and accompanying text.
[227] See, eg, New South Wales, *Parliamentary Debates,* Legislative Assembly, 23 October 2002, 5764 (Carr); Ipp Report, above n 16, [1.24], [4.11-13], [4.21-24]; *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* [2004] NSWCA 247, [157].
[228] *Fallas v Mourlas* [2006] NSWCA 32, [121] (Basten JA) ('*Fallas*'). See also [45-6] (Ipp JJA); cf *Maloney* [2006] NSWCA 136, [177].
[229] See discussion at above n 47-62 and accompanying text. See generally, Lunney, above n 84.
[230] See discussion at above n 70 and 115 and accompanying text.
[231] See, eg, Kirby J's dissenting judgement in *Neindorf* (2005) 222 ALR 631 discussed at above n 209 and accompanying text; and given the close 4:3 majority, the minority judgements in *Vairy* (2005) 221 ALR 711 at above

such an argument is dependant upon future judicial interpretation of "obvious risk" under the legislation not being so broad so as to encompass these additional factors also.

This part, with particular emphasis upon claimant inadvertence, therefore considers, with reference to case law concerning the term's legislative definition, whether the difference between the significance of obviousness at common law and under the reforms is as great as the legislation suggests.

A *Defining Obviousness*

Section 13 of the *Civil Liability Act 2003* (Qld), providing the most comprehensive definition of "obvious risk," is illustrative[232] and states that:

> (1) … an ***obvious risk*** to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
> (2) Obvious risks include risks that are patent or a matter of common knowledge.
> (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
> (4) A risk can be an obvious risk even if the risk (or condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.[233]
> (5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless that failure itself is an obvious risk.[234]

However, whilst operating within the confines of the reforms only,[235] the definition's interpretation may be informed by notions of obviousness at common law.[236]

For the purpose of subsection 1 of the New South Wales definition (and presumably its State counterparts), it has been confirmed, similarly to the common law, that whilst any consideration of the obviousness of a risk is objective and proceeds from the perspective of a "reasonable person," regard must also be had to the particular circumstances in which the harm is suffered.[237] This has been stated, in relation to the reforms, to necessitate a 'consideration of the position of the person who suffers harm and *whatever else is relevant to establishing that position*.'[238] Consequently, the

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n 136-151 and accompanying text. Also *Berrigan* [2005] VSCA 159 at above n 58 and accompanying text; *Wilkins* [2005] NSWCA 468 at above n 116 and accompanying text; Keeler, above n 90, 64.

[232] See also, *Civil Liability Act 2002* (NSW) s 5F; *Civil Liability Act 2002* (WA) s 5F; *Civil Liability Act 2002* (Tas) s 15; *Civil Liability Act 1936* (SA) s 36; *Wrongs Act 1958* (Vic) s 53. The Tasmanian legislation also provides that 'a risk is not an obvious risk merely because a warning about the risk has been given' (s 15(5)).

[233] Not in South Australia.

[234] Not in New South Wales, South Australia, Tasmania or Western Australia. Nevertheless, in New South Wales, it has been confirmed that where another's negligence (or failure to properly operate or care for a thing) *is well-known to a plaintiff*, it would constitute a risk which is patent or a matter of common knowledge within ss 2: *Maloney* [2006] NSWCA 136, [113], [174] (unbuffed polish carelessly left on a floor was not obvious); *Fallas* [2006] NSWCA 32, [98-108] (Tobias JA), [156-8] (Basten JA). (Ipp JJA dissenting) (negligent discharge of a firearm was obvious).

[235] *Carey* [2007] NSWCA 4, [34], [71]; cf *Sheridan v Borgmeyer* [2006] NSWCA 201, [12-6] where the statutory definition was used to define obvious risk for the purpose of breach of duty at common law, in a case apparently otherwise considered independently of the reforms.

[236] Mcdonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia', above n 102, 482; *Mikronis v Adams* (2004) 1 DCLR (NSW) 369, [80] ('*Mikronis*').

[237] *Fallas* [2006] NSWCA 32, [98-101]; *Smith* [2006] NSWSC 288, [77-8]; *Maloney* [2006] NSWCA 136, [109]; *Mikronis* (2004) 1 DCLR (NSW) 369, [78]. See also above n 9 and accompanying text.

[238] *Doubleday* [2005] NSWCA 151, [28] (Bryson JA. Young CJ and Hunt AJA concurring) (emphasis added).

considerations relevant to establishing obviousness under the legislation are potentially very wide, and have been held to include a claimant's age, expertise and personal characteristics. For example, Bryson JA in *Doubleday v Kelly* found that the risk of injury to a child, who attempted to skate on a trampoline, was not obvious to a reasonable person in their position, and noted that: 'the characteristics of being a child of seven with no previous experience in the use of trampolines or roller skates, who chose to get up early in the morning and play unsupervised, is part of that position.'[239] Apposite to a consideration of claimant inadvertence, the "position of the plaintiff" may also include their 'knowledge and experience of the relevant area and conditions.'[240] In the context of an occupier's failure to warn *Dederer v Roads and Traffic Authority*[241] is illustrative.

B *Dederer's Case*

Here a damages claim was brought against the Great Lakes Council[242] by a plaintiff rendered partially paraplegic at 14½ years after diving off a bridge. The plaintiff and his family had regularly visited the area and there was, to his knowledge, a history of jumping or diving at that location.[243] This was most recently observed by him on the day of his accident. The day before, he had jumped from the bridge twice. The claim concerned, in part,[244] an allegation that despite there being a prohibition or "no diving" sign on the bridge, the Council had failed to adequately warn the plaintiff of the "dangers" of diving at that location. The plaintiff argued that the sign just told him that he should not dive, 'it did not put any danger into it.'[245] Similarly to *Vairy* and *Mulligan* there was evidence that the plaintiff knew that the depth of the channel into which he dove was variable.[246] The defendant also knew of its variable depth, the risk of injury and the continued practice of diving.[247] However, at trial, in finding the Council in breach of its duty of reasonable care, Dunford J rejected the contention that, pursuant to s 5F of the *Civil Liability Act 2002* (NSW), the risk of harm was obvious:

> the plaintiff was a 14 year old who had seen a large number of persons jumping and diving off the bridge over many years, without any apparent attempt … to stop them and no known cases of injury. He may … know of the variable depth of the water, but from what he had observed and having regard to his age and lack of maturity, the fact that he knew vessels passed through the channel, he looked and … could not see the bottom, all of which indicated to him that the water was deep, the risk of serious permanent injury would not have been obvious to him, even if it would have been obvious to a mature adult.[248]

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[239] Ibid. Nevertheless a warning against using the trampoline was not an adequate discharge of the defendant's duty. Rather its unsupervised use should have been prevented by turning it over. See also, *Waverley Council v Ferreira* [2005] NSWCA 418, [71-2] (not a failure to warn case).
[240] *Carey* [2007] NSWCA 4, [94]. See also *Dederer* [2006] NSWCA 101, [152]; *Mikronis* (2004) 1 DCLR (NSW) 369, [78], [81] (where the nature of the risk (of a saddle slipping during a trail ride) changed from non-obvious to obvious as the plaintiff's knowledge of the risk increased).
[241] [2005] NSWSC 185.
[242] The plaintiff also claimed against the Roads and Traffic Authority as joint occupier of the bridge (at ibid [53]), but only the action against the Council was subject to the *Civil Liability Act 2002* (NSW).
[243] This had been observed by the plaintiff over the past seven years: [2005] NSWSC 185, [7-11], [54], [65], [70].
[244] A claim was also made against the Council for failing to enforce the prohibition, or cause the practice of jumping and diving from the bridge to cease by charging offenders. However s 43 (now s 43A) of the *Civil Liability Act 2002* (NSW) operated to deny liability on this account: ibid [88-9].
[245] [2005] NSWSC 185, [12].
[246] Ibid [7], [18]. See also above n 160-170 and accompanying text.
[247] Ibid [55-7].
[248] Ibid [87].

However an appeal, in *Great Lakes Shire Council v Dederer; Roads and Traffic Authority of NSW v Dederer*, held that the risk of 'serious spinal injury, flowing from the act of diving off the bridge,'[249] "was" obvious, such that there was no liability in negligence under the Act.[250] In reaching this conclusion, the Court was influenced by the following.[251] Firstly, evidence: of the plaintiff's knowledge of the water's variable depth and that jumping from heights could result in injury; and that part of the plaintiff's thrill from jumping and diving was the risk. These factors, which were relied upon at trial to find contributory negligence, were deemed inconsistent, on appeal, with a holding that the risk was not obvious.[252] Secondly, findings that: contrary to the plaintiff's claim, and similar to *Nagle v Rottnest Island Authority*,[253] the prohibition or "no diving" sign, would have warned a reasonable 14½ year old that diving into the water was dangerous; and the danger should have been obvious to one diving from a height of nine meters into an estuary for the purpose of entering water 10 meters from a visible sandbar. Such factors were considered to outweigh the influence of the common practice, in relation to the obviousness of the risk, as '[w]hile jumping was commonplace, the number of persons diving off the bridge over the years was far less.'[254] Evidence given by the plaintiff's father when asked why, although jumping from the bridge he had never dived, was also to the effect 'that he was not "game"' and that '[s]omething in my head said don't dive.' The Court considered this an 'understandable state of mind, brought about by the [risk's] obviousness.'[255]

Relevant to an occupier's liability for obvious risks, this decision therefore offers some important insights into the concept of "obviousness" under the tort reform legislation.

C *Effect*

At the outset *Dederer* evidences a disparity in treatment of the weight given to claimant inadvertence under the reforms. Such divergence, as the High Court's decisions in *Vairy*[256] and *Mulligan*[257] illustrate, is also apparent at common law. However in *Dederer*, this disparity existed, not only as between the decision at trial and on appeal, but also, interestingly, as between defendants on appeal. The Court of Appeal although finding the risk obvious, upheld a negligence claim against the Roads and Traffic Authority ('*RTA*'), in part, due to a failure to post a sign emphasising both the nature of the danger and a prohibition.[258] This claim was decided solely at common law.[259] In doing so however, the Court seemingly attached greater weight to plaintiff inadvertence, and the common practice of diving and jumping in obscuring the otherwise obvious risk of diving into water of variable depth:

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[249] [2006] NSWCA 101, [151] (Ipp JA. Handley and Tobias JJA concurring).
[250] Due to: the plaintiff's presumed knowledge of an obvious risk; there being no duty to warn of an obvious risk; and there being no liability in negligence for harm suffered as the result of the materialisation of an obvious risk of a dangerous recreational activity (*Civil Liability Act 2002* (NSW) ss 5G, 5H, 5L).
[251] [2006] NSWCA 101, [153-72].
[252] Ibid [155].
[253] (1993) 177 CLR 423, 432. See also, ibid [237] (Ipp JA), [40] (Handley JA)
[254] [2006] NSWCA 101, [166].
[255] Ibid.
[256] (2005) 221 ALR 711.
[257] (2005) 221 ALR 764.
[258] The RTA were also liable for failing to modify the bridge railing so as to make access to it, for the purpose of diving, more difficult: [2006] NSWCA 101, [236-61], [307] (Ipp JA). (Tobias JA concurring. Handley JA dissenting).
[259] Proceedings against the RTA started prior to the 6 December 2002 commencement of the *Civil Liability Act 2002* (NSW).

> it is one thing to be aware, in theory, of a risk. It is another to be conscious of that risk so that one bears it in mind before embarking on activities ... This is all the more so when one is a boy … the fact that, for several years, Mr Dederer had observed children jumping and diving, apparently without intervention … would also tend to provide him with some reassurance.[260]

This together with the defendant's knowledge of: the risk;[261] and the fact that the prohibition was being ignored, was relevant to a finding of breach:

> the obvious risks involved in jumping … were not a deterrent. Many visitors to the bridge were young people. The RTA could not assume that these persons would take reasonable care for their own safety. Experience over the years had shown that, in large numbers, this was not what they were doing.[262]

Additionally, 'that there had been no previous injury, and that the depth had always been adequate, made it more unlikely that persons would refrain from diving'[263] – children 'could be expected to be oblivious to the risks involved.'[264]

In the situation of the RTA, the greater focus on the common practice leading to claimant inadvertence, may be due to the emphasis given by the Court to the fact that the bridge had been constructed by the RTA's predecessor. Therefore to the extent that its design and flat railings constituted an allurement to young people to dive, the RTA had, in effect, created the danger and the High Court's decisions in *Vairy* and *Mulligan* were distinguished. Consequently, 'the standard of care that the RTA had to exercise was higher than that required from an authority that controls land where natural features constitute a danger to the public.'[265] As argued previously,[266] judicial allowance for claimant inadvertence increases as the standard of care owed increases. Nevertheless, even if the Council also owed a special standard of care, this would be unlikely to constitute a "circumstance relevant to a reasonable person in the position of the plaintiff" under the statutory obvious risk definition.

As against the Council, the greater focus on claimant inadvertence at trial, as apposed to on appeal, may stem from differing degrees of precision in how the relevant risk, said to be obvious, was described. Similarly to the common law,[267] in some cases under the reforms the "risk" has been defined by reference to a risk of harm.[268] Conversely, others have focused upon the risk as being that 'which matured and caused [the] injury.'[269] Which risk is picked, and how that which is picked is defined, may be critical. For example, 'the risk of falling off a horse [may be] obvious in the ordinary sense of the word and for the purpose of the legislation … whereas the risk of a saddle slipping may not be.'[270] Consequently in *Dederer*, Dunford J stated that s 5G

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[260] [2006] NSWCA 101, [312] (Ipp JA) (stated in the context of causation). See also [372-3] (Tobias JA).
[261] Studies indicated that the water's depth varied continually and could be dangerously shallow for those entering it: ibid [185-214].
[262] Ibid [221] (Ipp JA). See generally [215-35].
[263] Ibid [231] (Ipp JA).
[264] Ibid [359] (Tobias JA).
[265] Ibid [226] (Ipp JA). Also [221-5], [235], [308] (Ipp JA), [355-8] (Tobias JA); cf [7-9] (Handley JA – RTA not liable for predecessor's acts or omissions).
[266] Discussed at above n 190-215 and accompanying text.
[267] See, eg, the differing degrees of precision with which the risk in *Woods* (2002) 208 CLR 460 was defined (discussed at above n 43 and accompanying text).
[268] *Smith* [2006] NSWSC 288 [77] (Studdert J).
[269] *Maloney* [2006] NSWCA 136, [174] (Bryson JA). See also *Fallas* [2006] NSWCA 32, [152-3].
[270] *Mikronis* (2004) 1 DCLR (NSW) 369, [75] (Dodd DCJ). Concerned a negligence action against a horse riding centre by a plaintiff who fell from her horse when her saddle, fastened by the defendant, became loose and slipped from position. The defendant argued that the harm suffered was the result of the materialisation of an obvious risk

of the *Civil Liability Act 2002* (NSW):

> speaks of the "risk of harm" and the "type or kind of risk even if the person is not aware of the precise nature, extent or manner of occurrence of the risk". This provision makes it apparent to me that the "risk" in "obvious risk" is a reference to the risk of harm, [or] the injury resulting from the danger and not a reference to the danger itself.[271]

As such it is argued that by focusing on the risk of harm, his Honour was more inclined to give weight to the common practice, as obscuring what might otherwise be an obvious risk of injury associated with diving into water of variable depth, and therefore leading to claimant inadvertence – For one may not expect such a practice of diving in an area if a risk of injury existed. Conversely however, the Court of Appeal,[272] appears to have focused more upon the "danger" of diving into water, especially that of variable depth, as constituting the obvious risk. In doing so, whilst careful to acknowledge that "obviousness" depends not upon the plaintiff's state of mind, but upon that of a reasonable person,[273] by referring to evidence of the plaintiff's own knowledge of the water's variability (used at trial to assess contributory negligence) in classifying the risk obvious, it seems to be a very fine line that the Court is drawing between assessing an occupier's liability (given the likely knowledge of reasonable entrants in the plaintiff's position) and an entrant's own culpability. However in the context of the reforms, this approach may simply reflect their pro-defendant nature[274] – warranting a greater assumption of responsibility by claimants and incidentally a lower regard for inadvertence by defendants.[275] It is therefore arguable that, as such decisions are fundamentally normative,[276] different results will arise, for the purpose of the obvious risk definition, depending upon both the level of particularly with which the relevant risk is identified and those 'aspects of "the position"[and knowledge] of the plaintiff which are to be ascribed to the reasonable person.'[277]

Therefore, while the "obviousness" of a risk under the reforms purports to be conclusive, as *Dederer* and other cases illustrate, future judicial interpretation of a "reasonable person's subjective perspective of obviousness" may include an investigation of at least some of the additional factors applicable at common law to determining whether an occupier's duty of care extends to an obligation to warn.[278] Of particular relevance are: the claimant's age and capacity; and likelihood that inadvertence, familiarity with an area or constant exposure to a risk will make them careless for their safety. Consequently, whilst influenced by notions of personal responsibility, the legislation's operation may potentially not be as restrictive as first

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of a dangerous recreational activity under s 5L of the *Civil Liability Act 2002* (NSW). See also *Maloney* [2006] NSWCA 136, [173-5].

[271] [2005] NSWSC 185, [86]. Section 5G deems plaintiffs to be aware of obvious risks: see above n 87-103 and accompanying text.

[272] [2006] NSWCA 101, [149-51], [155], [160-72].

[273] [2006] NSWCA 101, [164]. That, similarly to the common law, a plaintiff's subjective awareness of a risk should be irrelevant unless it represents, in the circumstances, the knowledge of a reasonable person, is supported by the dangerous recreational activity reforms which apply 'whether or not the person suffering harm was aware of the [obvious] risk': *Civil Liability Act 2003* (Qld) s 19(2); *Civil Liability Act 2002* (NSW) s 5L(2); *Civil Liability Act 2002* (WA) s 5H(2); *Civil Liability Act 2002* (Tas) s 20(2).

[274] Discussed at above n 227-229 and accompanying text.

[275] See above n 180-183 and accompanying text.

[276] See, eg, *Maloney* [2006] NSWCA 136, [108]. Here Santow JA refers to *Thompson* (2005) 214 ALR 452, 461 which confirms the relevance of a risk's obviousness to determining community standards of reasonable behaviour.

[277] *Fallas* [2006] NSWCA 32, [153] (Basten JA).

[278] See above n 21-27 and accompanying text.

anticipated. Nevertheless, the relative weight afforded to claimant inadvertence, in particular, remains at present uncertain and hard to predict.

V CONCLUSION

In the context of an occupier's liability for failure warn in negligence, the obviousness of a risk, and a conclusion that reasonableness requires a warning; ultimately depend upon the circumstances of an individual case, and a normative judgement reflective of the policies of personal responsibility, individual autonomy and vulnerability. However, although what is an "obvious risk" is now defined by legislation (at least for the purpose of the tort reforms), the cases as a whole – both at common law, and under the reforms – commonly exhibit a divergence of judicial opinion both as to: whether a risk is obvious; and the relevant weight to be afforded to the factors impacting upon this assessment. This is illustrated by the differences in treatment afforded by the cases to the consideration of claimant inadvertence caused by the obscuring of an ordinarily obvious risk.

This article argues that the scope afforded to the operation of considerations of claimant inadvertence will ultimately depend upon: the judicial emphasis given to plaintiff responsibility, autonomy and vulnerability; the level of particularity with which the relevant risk is defined; and those aspects of the plaintiff's position and knowledge which are ascribed to the reasonable person (or whether a purely subjective perspective of risk is erroneously employed). At common law, the impact of claimant inadvertence will also be influenced by the standard of care determined according to the status and position of the occupier *vis-à-vis* the entrant. Therefore, whilst the potential for inadvertence, misjudgement or carelessness on the part of an entrant, arguably remains a relevant consideration in this area, the weight afforded to it is often uncertain and hard to predict. This uncertainty is compounded by the tort law reform legislation. Consequently, in the short term and perhaps more than ever before, despite the volume of case law in this area in recent years, there would seem to be little that "is" obvious in navigating an occupier's liability for obvious risks.